Supreme Court, U.S.
FILED

95 1186 JAN 23 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

NEW HAMPSHIRE MOTOR TRANSPORT, *et al.*,

Petitioners,

vs.

TOWN OF PLAISTOW,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRITT OF CERTIORARI

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115 pp

QUESTIONS PRESENTED

1. Whether it was error for the Court of Appeals to hold that the Surface Transportation Assistance Act (STAA) does not preempt a local zoning ordinance enforced so as to prohibit nighttime access to an interstate trucking facility located in an adjacent municipality for reasons not related to safety and whether it was error to hold that the nighttime restriction does not deny reasonable access to the terminal facility under the STAA?

2. Whether the Court of Appeals erred in holding that the enforcement of a local zoning ordinance so as to prohibit nighttime access to a trucking terminal located in an adjacent municipality was not preempted under the Hazardous Materials Transportation Uniform Safety Act?

3. Whether the Court of Appeals erred in holding that the enforcement of a local zoning ordinance restricting nighttime access to an interstate trucking terminal located in an adjacent municipality does not violate the Commerce Clause?

4. Whether the Court of Appeals erred in holding that the enforcement of a local zoning ordinance denying nighttime access to a trucking terminal located in an adjacent municipality is not preempted by the Noise Control Act where the enforcement of the ordinance was based upon the noise omitted by the trucks?

LIST OF PARTIES

The Petitioners are the New Hampshire Motor Transport Association (NHMTA),Arnold Pevna, Trustee of Olympiad Realty Trust(Olympiad),Atlas Motor Express, Inc.(Atlas)(no parent or subsidiaries), Engle Oostdyke, Inc.(no parent or subsidiaries), Gerard Express, Inc.(no parent or subsidiaries), Peterri Transportation Co., Inc.(no parent or subsidiaries), Wolf Trucking, Inc.(no parent or subsidiaries), and Ivan Bondy.

The respondent is the Town of Plaistow.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions, Statutes and Regulations Involved	3
Statement of the Case	9
A. Procedural History.	9
B. Course of Proceedings.	10
C. Statement of Facts.	10
Reasons for Granting the Writ	16
Summary	16
I. The Court of Appeals erred in finding that the Surface Transportation Assistance Act does not preempt a local zoning ordinance which has been enforced in such a manner as to prohibit	

Contents

Page

nighttime access to an interstate trucking facility located in an adjacent municipality for reasons not related to safety. 17

II. The Hazardous Materials Uniform Safety Act preempts a local zoning ordinance enforced so as to prohibit nightime access to a trucking terminal located in an adjacent municipality. 21

III. The enforcement of the Plaistow ordinance impedes interstate commercial traffic traveling through the town where its enforcement is preempted by other federal statutes and such enforcement violates the Commerce Clause. .. 23

IV. If enforcement of the Plaistow ordinance was based upon noise omitted by the trucks entering and leaving the terminal, it was preempted by the Noise Control Act. 25

Conclusion 26

TABLE OF CITATIONS

Cases Cited:

A.B.F. Freight System, Inc. v. Suthard, 681 F. Supp. 334 (E.D. Va. 1988) 18

Baltimore & Ohio Railroad v. Oberly, 837 F.2d 108 (3d Cir. 1988) 25, 28

Contents

	Page
Hyde Park Partners, L.P.V. Connolly, 839 F.2d 837 (1st Cir. 1988)	23, 24
National Tank Truck Carriers, Inc. v. Burke, 335 F. Supp. 509 (D.R.I. 1982), *aff'd*, 608 F.2d 819 (1st Cir. 1979)	22
New Hampshire Motor Transport v. Town Of Plaistow, 67 F.3d 326 (1st Cir. 1995)	2
New Hampshire Motor Transport v. Town Of Plaistow, 881 F. Supp. 695 (D.N.H. 1994)	1
New Hampshire Motor Transport v. Town Of Plaistow, 836 F. Supp. 59 (D.N.H. 1993)	1
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	23
Statutes Cited:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	3
42 U.S.C. § 4901, *et seq.*	7, 10, 25
42 U.S.C. § 4916(c)	25
42 U.S.C. § 4917	9
42 U.S.C. § 4917(a)	8

Contents

	Page
42 U.S.C. § 4917(c)	7, 25
49 U.S.C. § 2312	4, 9
49 U.S.C. § 5125	21
49 U.S.C. § 31111(c)	16
49 U.S.C. § 31114	2, 3
49 U.S.C. 31114(A)	20
United States Constitution Cited:	
Article I, § 8	9
Rules Cited:	
Federal Rule of Appellate Procedure 4(a)(3)	3
Federal Rule of Civil Procedure 12(b)(6)	1, 10, 17, 25
Other Authorities Cited:	
23 C.F.R. § 658.19	4
23 C.F.R. § 658.19(a)	20
23 C.F.R. § 658.19(d)	20
23 C.F.R. § 658.19(i)	20

Contents

	Page
23 C.F.R. § 658.19(i)(2)(ii)(A)	20
40 C.F.R. § 202	8, 25
49 C.F.R. § 177.853	9
55 Fed. Reg. 22758	20

APPENDIX

Appendix A — Order of the United States Court of Appeals for the First Circuit Entered October 25, 1995	1a
Appendix B — Order on Petition for Rehearing of the United States Court of Appeals for the First Circuit Entered October 25, 1995	3a
Appendix C — Opinion of the United States Court of Appeals for the First Circuit Dated September 20, 1995	6a
Appendix D — Order of the United States District Court for the District of New Hampshire Filed September 19, 1994	24a
Appendix E — Order on Motion to Dismiss of the United States District Court for the District of New Hampshire Filed October 25, 1993	45a
Appendix F — Relevant Statutes, Regulations and Constitutional Provisions	67a

OPINIONS BELOW

On a motion filed pursuant to the provisions of Rule 12(b)(6), Federal Rules of Civil Procedure, the federal District Court for the District of New Hampshire held that if a state or local municipality enacts a statute or ordinance which denies commercial motor vehicles, subject to the Surface Assistance Transportation Act, "reasonable access" to the terminals, then it is a violation to the federal law except that reasonable restrictions on "pup" commercial vehicles are allowed if the object is safety. The court also held that the Hazardous Materials Transportation Uniform Safety Act would preempt a local ordinance if there was proof that the transportation of waste covered by the HMTUSA was involved in a "unnecessary delay" as a result of the enforcement of the local ordinances. The District Court held that the Commerce Clause would preempt a local ordinance if the imposition upon interstate commerce is clearly excessive in relation to the putative local benefits of the ordinance. Finally, in ruling upon the 12(b)(6) motion, the court held that the Noise Control Act could not under any set of proved facts be said to preempt the local ordinance and therefore, dismissed the count of the original claim based upon the NCA. *New Hampshire Motor Transport v. Town Of Plaistow*, 836 F. Supp. 59 (D.N.H. 1993) (App. E).

After a three day bench trial, the District Court found against the Petitioners on the STAA claim, the HMTUSA claim and the Commerce Clause claim. The court did find that the nature of the trucking business is such that night operations are essential. Note that the STAA and HMTUSA were recodified in 1994 after the complaint was brought and shortly before trial and are referred to under their previous references in the District Court proceeding *New Hampshire Motor Transport v. Town Of Plaistow*, 881 F. Supp. 695 (D.N.H. 1994) (App. D).

The First Circuit affirmed the District Court decision holding that under § 31114 (formerly referred to as § 2312) of the STAA states could place restrictions upon access to terminals based on reasons other than safety. The Court of Appeals also refused to review the fact specific decision that the restriction did permit reasonable access. The Court of Appeals held that the HMTA did not preempt the local ordinance because there had been no showing by the Petitioners as to the impact of the delays caused by the local ordinance. The Court of Appeals also found that the NCA did not pre-empt the local ordinance because the local ordinance was based upon factors including "odors, dust, smoke, refuge matter, fumes . . . and vibration" rather than regulating decibel levels of trucks. In regard to the claim that the ordinance violates the Commerce Clause, the Court of Appeals found no violation because the burden on interstate commerce was not clearly excessive in relation to the local benefits. *New Hampshire Motor Transport v. Town Of Plaistow,* 67 F.3d 326 (1st Cir. 1995) (App. C).

On October 25, 1995, the Court of Appeals denied the Petitioners' petition for rehearing (App. B).

STATEMENT OF JURISDICTION

The Court's jurisdiction to review the decision of the United States Court of Appeals for the First Circuit affirming the District Court's order is invoked pursuant to 28 U.S.C. § 1254 (1).

The complaint in this case was filed in the federal District Court for the District of New Hampshire on March 26, 1993. The complaint alleges that actions taken by the Respondent Town to enforce a portion of its zoning ordinance against the Petitioners, in effect imposing a restriction upon nighttime access by trucks to an interstate trucking terminal located in an adjacent municipality were preempted by federal statutes and the United States Constitution as follows:

COUNT I, The Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31101 (1994) et. seq. — specifically § 31114,(formerly codified as § 2312) (App. F, 73a); *COUNT II*, The Hazardous Materials Transportation Uniform Safety Act (HMTUSA), 49 U.S.C. § 5101 (1994) et seq. — specifically § 5125 (a) (App. F, 71a); *COUNT III*, The Noise Control Act (NCA), 42 U.S.C. § 4901 (1972) et seq. — specifically § 4917 (c) (App. F, 69a) and *COUNT IV*, the Commerce Clause, Art. I., § 8, cl. 3, of the United States Constitution (App. F, 79a).

The Petitioners sought to enjoin enforcement of the ordinance claiming preemption by the federal statutes and the constitutional provisions that were raised. Jurisdiction was obtained in the District Court pursuant to 28 U.S.C. § 1331.

After the District Court decision the Petitioners timely filed a notice of appeal pursuant to Federal Rules of Appellate Procedure, Rule 4(a)(3). On September 20, 1995 the Court of Appeals affirmed the District Court decision. The Petitioners timely brought a motion for reconsideration, which motion was denied on October 25, 1995. This petition for writ of certiorari is timely filed within 90 days from the date of the denial of the motion forreconsideration October, 25, 1995.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Surface Transportation Assistance Act, 49 U.S.C. § 31114 (1994) in pertinent part provides as follows:

> (a) **Prohibition of denying access.** A State may not enact or enforce a law denying to a commercial motor vehicle subject to this

> subchapter or subchapter I of this chapter reasonable access between — (1) the Dwight D. Eisenhower System of Interstate and Defense Highways (except a segment exempted under section 31111(f) or 31113(e) of this title) and other qualifying Federal-aid Primary System highways, designated by the Secretary, and (2) terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading for household goods carriers, motor carrier of passengers, and for any truck tractor-semitrailer combination in which the semitrailer has a length not more than 28,5 feet and that generally operates as part of a vehicle combination described in section 31111(c) of this title.
>
> (b) **Exception.** This section does not prevent a State of local government from imposing reasonable restrictions, based on safety considerations, on a truck tractor-semitrailer combination in which the semitrailer has a length of not more than 28.5 feet and which generally operates as part of a vehicle combination described in section 31111(c) of this title.

The District Court proceedings refer to the above section of the STAA as 49 U.S.C. § 2312. Title 49 was recodified effective July 5, 1995.

2. The Regulations set forth in 23 C.F.R. § 658.19 in part provides as follows:

> (a) No State may enact or enforce any law

denying reasonable access to vehicles with dimensions authorized by the STAA between the NN (National Network) and terminals and facilities for food, fuel, repairs, and rest. In addition, no State may enact or enforce any law denying reasonable access between the NN and points of loading and unloading to household goods carriers, motor carriers of passengers, and any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 feet (28.5 feet where allowed pursuant to § 658.13(b)(5) of this part) and which generally operates as part of a vehicle combination described in §§658.13(b)(5) and 658.15(a) of this part.

(b) All States shall make available to commercial motor vehicle operators access provisions to and from the National Network.

(c) Nothing in this section shall be construed as preventing any State or local government from imposing any reasonable restriction, based on safety considerations, on access to points of loading and unloading by any truck tractorsemitrailer combination in which the semitrailer has a length not to exceed 28 1/2 feet and which generally operates as part of a vehicle combination described in §§658.13(b)(5) and 658.15(a). . . .

(d)(1) Except in those State in which State law authorizes the operation of STAA-dimensioned vehicles on all public roads and highways, all States shall have an access

review process that provides for the review of request for access from the National Network.

(d)(2) State access review processes shall provide for:

(i) One or more of the following:

(A) An analysis of the proposed access routes using observations or other data obtained from the operation of test vehicles over the routes;

(B) An analysis of the proposed access routes by application of vehicle templates to plans of the routes;

(C) A general provision for allowing access, without requiring a request, for commercial motor vehicles with semitrailers with a kingpin distance of 41 feet or less (measured from the kingpin to the center of the rear axle, if single, or the center of a group of rear axles). State safety analyses may be conducted on individual routes if warranted; and

(ii) All of the following:

(A) The denial of access to terminals and services only on the basis of safety and engineering analysis of the access route. . .

3. The Hazardous Materials Transportation Uniform Safety Act of 1990 provides in part:

> Except as provided in subsections (b), (c) and (e) of this section, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if — (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or regulation prescribed under this chapter is not possible; or (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

4. The Noise Control Act, 42 U.S.C.§ 4901, *et seq.* — specifically § 4917(c) provides as follows:

> (1) Subject to paragraph (2) of this subsection but notwithstanding any other provision of this chapter, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any motor carrier engaged in interstate commerce, no State or political subdivision thereof may adopt or enforce any standard applicable to the same operation of such motor carrier, unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

5. The United States Environmental Protection Agency has

adopted noise emission regulations pursuant to 42 U.S.C. § 4917(a), regulations contained in 40 C.F.R. § 202 (1992) provide as follows:

> (a) No motor carrier subject to these regulations shall operate any motor vehicle of a type to which this regulation is applicable which at any time or under any condition of highway trade [sic],18 load, acceleration or deceleration generates a sound level in excess of 86dB(A) measured on an open site with fast meter response at 50 feet from the centerline of lane of travel on highways with speed limits of 35MPH or less; or 90dB(A) measured on an open site with fast meter response at 50 feet from the centerline of lane of travel on highways with speed limits of more than 35MPH.
>
> (b) No motor carrier subject to these regulations shall operate any motor vehicle of a type to which this regulation is applicable which at any time or under any condition of highway grade, load, acceleration or deceleration generates a sound level in excess of 83 dB(A) measured on an open site with fast meter response at 50 feet from the centerline of lane of travel on highways with speed limits of more than 35 MPH.
>
> (c) The provisions of Subpart B apply only to those motor vehicles of such motor carriers which have a gross vehicle weight rating or gross combination weight rating in excess of 10,000 pounds, and only when such motor

> vehicles are operating under the conditions specified in Subpart B.

6. The Commerce Clause, Constitution Article I, § 8 provides as follows:

> The Congress shall have the Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

STATEMENT OF THE CASE

A. Procedural History.

The within action was instituted by the filing of a complaint by the eight named Petitioners. The NHMTA is in an association of New Hampshire truckers. Olympiad Realty Trust is the owner of a trucking terminal located in the Town of Newton, New Hampshire, with access through a private way located in the Town Of Plaistow, New Hampshire to a state highway also located in Plaistow. The other Petitioners are trucking companies, all of whom are engaged in interstate commerce. One of the trucking companies, Atlas Motor Express, runs its operation from the terminal which is leased from Olympiad. The others use the terminal on a regular basis. The complaint sought injunctive and declarative relief barring the Respondent Town of Plaistow from enforcing section 1.4 of its zoning ordinance, in such a manner as to unreasonably interfere with the trucking operations at the terminal on the grounds that the enforcement of the ordinance was preempted by 49 U.S.C. § 2312, 49 C.F.R. § 177.853, 42 U.S.C. § 4917 and the United States Constitution Article I, § 8, cl. 3.

B. Course of Proceedings.

The complaint was filed with the District Court on March 26, 1993. The Defendant subsequently filed a motion to dismiss pursuant to provisions of FRCP 12(b)(6) which was allowed in part and denied in part (*See* App. E). The court did dismiss Count III of the Petitioners' complaint, which sought relief on the basis that the local ordinance was preempted under the Federal Noise Control Act, 42 U.S.C. § 4901, *et seq.*

The remaining claims of the Petitioners were the subject of a three day bench trial after which the District Court on September 19, 1994 issued an order denying the Petitioners' requests for relief on all counts. The order included extensive findings of fact (*See* App. D).

The Petitioners timely filed an appeal of the District Court order with the First Circuit Court of Appeals on October 13, 1994, and the First Circuit affirmed the District Court in a decision dated September 27, 1995 (*See* App. C). The Petitioners timely filed a petition for rehearing and the First Circuit Court of Appeals denied the petition on October 25, 1995 (*See* App. B).

C. Statement of Facts.

Atlas Motor Express, Inc. (Atlas) is a New Hampshire corporation engaged in the trucking business and is a certificated interstate motor carrier. In 1983, Atlas opened for business, operating out of a terminal in Haverhill, Massachusetts. In 1986, it moved to a terminal building in Plaistow, New Hampshire where it operated, without restriction, until 1988. Atlas picks-up and delivers freight to customers and terminals located within the New England states.

In May of 1987, Arnold Pevna as trustee of Olympiad Realty

Trust entered into an agreement to purchase a parcel of land located partially in the Town of Plaistow, but predominantly in the Town of Newton, New Hampshire. Olympiad entered into the agreement to purchase the parcel contingent on obtaining all necessary approvals from governmental agencies (including the Towns of Newton and Plaistow) to construct a trucking terminal.

The site for the proposed terminal was located wholly in an industrial zone in the Town of Newton, on which all building construction would take place. Adjacent to the site and within an industrial zone in Plaistow is a business operating a lumber yard and dry wood kiln. Both the proposed terminal and the existing kiln and lumber operation would share access over a private road known as Garland Way to Kingston Road, a public way in the Town of Plaistow. Garland Way is located wholly within the town of Plaistow, partially within an industrial zone and partly within a residential zone.

Olympiad inquired of the Town of Plaistow Planning Board what approvals would be required for the project and was informed in writing that "since the proposed site was entirely in Newton and, with access through a private drive with passage easement," no public hearing was required in the Town of Plaistow. Olympiad sought site plan approval from the Town of Newton Planning Board. Abbuters in both Newton and Plaistow were notified and given an opportunity to be heard at public hearings. Ultimately the Town of Newton granted the necessary approvals.

Subsequently, three of the Plaistow homeowners along Kingston Road in Plaistow brought a writ of certiorari in state court against the Newton Planning Board. The lawsuit was settled with Olympiad agreeing to pave the easement, plant trees as a noise buffer and posting a sign allowing only right turns form Garland Way onto Kingston Road. Olympiad then purchased the

parcel on February 10, 1988. Olympiad subsequently constructed a trucking terminal *located entirely within the Town of Newton* but with access via the private way (Garland Way) in the Town of Plaistow to Kingston Road in Plaistow. The cost of the construction of the terminal and acquisition of the real estate exceeded one million dollars. The terminal was leased to Atlas and on September 26, 1988, Atlas commenced its trucking operations at the terminal.

On October 7, 1988, the Town of Plaistow served on Atlas and Olympiad a notice to cease and desist its operation based on alleged violation of Section 1.4 of the Town of Plaistow zoning ordinance, which provides

> Any uses that may be obnoxious or injurious by reason of the production or emission of odors, dust, smoke, refuse, matter, fumes, noises, vibrations or other similar conditions, or that are dangerous to the comfort, peace, enjoyment, health or safety of the community whether it contributes to its disturbance or annoyance are prohibited in all Districts.

Atlas continued to operate the terminal, and on February 7, 1989, the Town of Plaistow filed a petition for temporary and permanent injunctive relief in the Rockingham County (New Hampshire) Superior Court. After issuing several temporary and permanent orders and modifications of orders the Superior Court eventually issued a permanent injunction enforcing the Plaistow ordinance that prevents commercial motor vehicles from entering or leaving the terminal as follows:

(a) 5:00 A.M. to 6:00 A.M.— three tractor trailers may enter or leave

(b) 6:00 A.M. to 9:00 P.M. — unrestricted

(c) 9:00 P.M. to 11:00 P.M. — two tractor trailer units may enter or leave

(d) 11:00 P.M. to 5:00 A.M. - no tractor trailer units may enter or leave

The court indicted it would not entertain any further modifications.

This action ensued as a result of the restrictions placed on the facility and the practical difficulties, based on the Petitioners' experience, of operating an interstate trucking business under the conditions imposed. At the trial of this action, several property owners along or near Kingston Road testified about the noise and odors from truck traffic at night. They live close to the intersection of Garland Way and Kingston Road. Some are elderly and their ailments are exacerbated by the trucks which pass by. Atlas has placed a gate at the entrance to the terminal that is closed between the hours of 11:00 P.M. and 5:00 A.M. The gate, however, is located in Newton, some distance from the intersection of Garland Way and the state highway in Plaistow so that trucks turn onto Garland Way before they realize they will not be allowed into the terminal. At times trucks operated by Atlas and the other motor carriers who use the terminal, have entered and existed the facility during restricted times.

Atlas' operation consists of several separate and distinct functions. Atlas engages in pickup and delivery work, in which a customer hires Atlas to pick up freight at one location within Atlas' operating area, New England, and deliver it to a second location within Atlas' operating area. Atlas also engages in the delivery business, which involves the delivery of freight from outside New England, often from Southern California, by a third-

party motor carrier, called "a line hauler" (such as the other truckers who are Petitioners), to the Atlas terminal, where the freight is distributed by Atlas to various customers located within Atlas' operating area. Finally, Atlas engages in freight assembly. Atlas' trucks pick up freight from various locations within its operating area and assembles it at its terminal, where the freight is loaded onto line hauler trucks for delivery outside of New England. About half of all the trailer loads entering or leaving the Atlas facility contain material defined as hazardous under the HMTUSA. Atlas has received certification from the U.S. Department of Transportation with regard to the hazardous materials it handles.

Engle Oostdyke, Inc., Gerard Express, Inc., Peterri Transportation Co., Inc., Wolf Trucking, Inc. and Ivan Bondy are each interstate motor carriers. They are based in various locations throughout the United States including New Jersey, Pennsylvania and California. Each has "line haul" trucks that use the Atlas terminal on a regular basis. The New Hampshire Motor Transport Association is an unincorporated association representing the interests of New Hampshire trucking companies.

The freight is shipped in trucks of varying sizes, from smaller trucks with gross vehicle weights of up to 33,000 pounds to line haul tractor-trailers with weights of up to 80,000 pounds. In order to leave the Atlas facility, a truck must proceed up Garland Way, a distance somewhat over 2,000 feet. From there trucks turn right and travel down Kingston Road about six-tenths of a mile to Route 125. Both Kingston Road and Route 125 are New Hampshire state highways. Route 125 was apparently part of the Federal-aid Primary Highway System but was inadvertently left off the list in 1991.

Kingston Road is heavily traveled and is used by many

trucks, including trucks not using the Atlas facility. Westbound line haulers would then proceed south on Route 125 about five and one-half miles to Interstate 495, just over the New Hampshire border in Massachusetts. Eastbound line haulers follow the same route in reverse. Most freight arrives via Interstate 495.

The District Court found that the nature of the trucking business is such that nighttime operations are essential to conducting business. Indeed, the terminal runs all night unloading some trailers and loading and reloading others. Assembly and distribution are especially subject to the time demands of Atlas' customers. In both retail and manufacturing the majority of customers practice "just in time" inventory control. Manufacturers and sellers no longer keep large stocks of goods and materials on hand. Rather, they rely on their shippers to get them the inventory they use on an as-needed, (usually on the day it is needed) basis.

Early-morning delivery to many customers, including to shopping malls because of restrictions placed on delivery times to stores, is an absolute requirement. This in turn requires departures in the earlymorning hours from the Atlas terminal to meet the schedule. The restrictions have prevented Atlas from fulfilling its obligations. This in turn has led to loss of customers and a loss of Atlas' profits. The District Court's finding imply that the trucking industry is highly competitive. Most trucking companies have to contend with the zero-inventory and other time demands of their customers. Few if any truckers and terminals, however have to deal with the curfew on access and egress of trucks that faces the Petitioners.

Similar problems arise with regard to the arrival of goods and materials transported by line-haul trucks to the Atlas terminal. Often trucks that use the terminal cannot predetermine their time of arrival or are delayed in their progress along the

interstate highway system. These delays are inevitable and may be caused by weather conditions, traffic, detours and other unforeseen and unavoidable reasons. The trucks may be exiting Interstate 495 at a time when access to the trucking terminal is not allowed by virtue of the court order. Often trucks owned by the Petitioners other than Atlas are impeded in their access to the Atlas terminal from Interstate 495 because of the time restrictions. A line hauler must be turned away at the gate if it arrives from a remote location after 11:00 P.M. or after 9:00 P.M. if two units have already entered. It has already proceeded, nevertheless, past all the neighbors on Kingston Road and turned down Garland Way. The driver can choose to either spend the night on the spot, with the engine running or off, or turn around and find another location where he may eat or sleep. In either case, the rig has passed by the Kingston Road homeowners; in the latter situation it will pass by twice more. There have been 10-to 12-hour delays in the shipment of hazardous materials, with the shipments sometimes sitting outside the gate during the curfew, as a result of the restrictions.

So-called "pup" or double tractor trailer units as described in § 31111(c) of 49 U.S.C. access the Atlas terminal on at least a weekly basis and have done so over the course of Atlas' trucking operations at its present location.

REASONS FOR GRANTING THE WRIT

SUMMARY

The decision of the First Circuit presents an important unanswered question and it presents a conflict with both case law and statutory and regulatory law. A conflict exists between the districts. The court's holding is directly contrary to the Surface Transportation Assistance Act and the pertinent regulations of the Department of Transportation. Both the statute and the

regulations allow localities to deny access to trucks only the basis of safety considerations. All of the District Courts in other Circuits which have addressed the issue have uniformly held that access cannot be denied on grounds other than safety.

The First Circuit opinion conflicts with federal case law and statutory and regulatory provisions regarding The HMTUA.

The decision of the Court of Appeals in upholding the District Court's dismissal of the Petitioners' claims based upon the NCA is in error in that the claim was dismissed by the 12(b)(6) motion and no evidence was received by the District Court, yet the First Circuit Court assumed that the town's actions under its ordinance were based upon factors other than noise.

The Circuit Court's decision regarding the Petitioners' Commerce Clause claim is also in conflict with well settled law and fails to consider the Plaistow ordinance as at attempt to regulate interstate trucking operations located outside of its jurisdiction.

I.

THE COURT OF APPEALS ERRED IN FINDING THAT THE SURFACE TRANSPORTATION ASSISTANCE ACT DOES NOT PREEMPT A LOCAL ZONING ORDINANCE WHICH HAS BEEN ENFORCED IN SUCH A MANNER AS TO PROHIBIT NIGHTTIME ACCESS TO AN INTERSTATE TRUCKING FACILITY LOCATED IN AN ADJACENT MUNICIPALITY FOR REASONS NOT RELATED TO SAFETY.

The relevant portion of the STAA (set forth verbatim prior hereto) provides that States may not enact or enforce laws denying commercial motor vehicles subject to the STAA

"reasonable access" between the interstate highway system and federal aid primary system highways to terminals and certain other facilities. Clearly, the states cannot enact laws contrary to statutes such as the STAA and the attempt to do so be preempted by federal law. *A.B.F. Freight System, Inc. v. Suthard*, 681 F. Supp. 334, 340 (E.D. Va. 1988).

Section 1.4 of the Plaistow zoning ordinance as enforced by the orders of the Superior Court of the State of New Hampshire prevents interstate trucks from entering or exiting a terminal located in the adjacent municipality of Newton. This is the case even though Plaistow declined to assert jurisdiction over the construction of the terminal because it was located wholly within the Town of Newton with access through a private drive in Plaistow.

The record below shows that the nighttime restriction has serious ramifications both for Atlas in meeting industry standards for delivery and for the "line Haul" trucks who come to the terminal from great distances sometimes to be turned away. It is also clear from the record that Plaistow's restrictions are in no way based upon safety but relate solely to disturbance suffered by Plaistow residents who live near the terminal's egress onto the state highway known as Kingston Road.

The Court of Appeals refused to review the factual basis for the District Court's finding that the imposition of the nighttime restriction was reasonable. It should be noted that the District Court decision endorses the state court decree which reached "an equitable compromise" between the "the exigencies of plaintiff's business and the equal rights of adjoining landowners in the enjoyment of their homes." Order of September 19, 1994, App. D, 40a. The Court of Appeals also seemingly accepts the access restriction as a "reasonable compromise" in light of the distance from Interstate 495 and Plaistow's interest in curbing

noise, odor, and dust in residential areas. Decision of the United States Court of Appeals for the First Circuit, September 20, 1995, App. C. 13a, 67 F.3d at 329. In no way does the STAA allow states to make equitable compromises in denying reasonable access to trucking terminals.

All of the courts that have addressed the question have held that the only restrictions upon reasonable access to trucking terminals allowable under the STAA are though restrictions based solely on safety considerations. *A.B.F. Freight System, Inc. v. Suthard,* 681 F. Supp. 334, *supra; Consolidated Corp. v. Larson,* 647 F. Supp. 1479 (M.D. Pa. 1986), *appeal granted,* 827 F.2d 916 (3d Cir. 1987), *cert. denied,* 484 U.S. 1032 (1988); *N.Y. Motor Truck Association v. City of New York,* 654 F. Supp. 1521 (S.D.N.Y.), *aff'd,* 833 F.2d 430 (2nd Cir. 1987). In *Consolidated Freightways Corp. v. Larson,* the District Court held that under the act States could "exercise their police powers to safeguard the safety of the public by denying as *unreasonable* access routes to and from the National Network that cannot be safely traversed by STAA vehicles. 647 F. Supp. at 1484 (emphasis in the original). The court further held that "*reasonable* access *must* be available" and "States may only exercise their police powers reasonably and in the interest of public safety. *Id.* (emphasis in the original). After the *Consolidated Freightways* case, two other District Courts addressed the issue and both came to the same conclusion regarding the inability of states to restrict access for reasons unrelated to safety. *N.Y. Motor Truck Association v. City of New York, supra; A.B.F. Freight System, Inc. v. Suthard, supra.*

The First Circuit Court of Appeals in direct conflict with prior case law concluded that safety is not the only permissible restriction on reasonable access. In part, it based its decision on what it found to be an inconsistency between Section A and Section B of 49 U.S.C. § 31114 (*See* App. C, 14a). The provisions of Section B allow an exception as to so called "pup" double

trailer combinations where the access restriction is based upon safety considerations. Section A does not directly mention safety considerations. If the safety consideration requirement is intended to apply only to "pup" combinations then logically the Plaistow ordinance could not deny access to "pup" combinations which are more noisy and more burdensome in every way. This simply does not make sense.

In any event regulations adopted pursuant to the provisions of the STAA resolve any conflict and were not taken into account by the Court of Appeals.

The Federal Highway Administration (FHWA) has acted under its rule making power and now requires "reasonable access" between the National Network and terminals. 23 C.F.R. § 658.19(a) (*See* App. F, 74a). That section provides that no "state may enact or enforce any law denying access within one road — mile from the National Network using the most reasonable and practical route available except for specific safety reasons on individual routes", (23 C.F.R. § 6568.19(d)). For terminals and services outside the one-mile area the regulations require states to establish procedures for reviewing requests for access from the National Network. 23 C.F.R. § 658.19(i). State programs may deny access to terminals "*only on the basis of safety and engineering analysis of the access route*" (emphasis added). 23 C.F.R. § 658.19(i)(2)(ii)(A).

In its preamble to the final rule, the FHWA notes that the "TRB report recommended that the states should be required to adopt reasonable processes based *only* on safety and engineering considerations. . .) 55 Fed. Reg. 22758 at 22761 (emphasis added). The FHWA regulations resolve several issues raised by the Circuit Court of Appeals. The absence of a safety exception in 49 U.S.C. § 31114(A) with reference to all vehicles but pups and the presence of a safety exception in § B relating to pups, is not a

"odd result" as the court states when read in connection with the FHWA regulations (*See* App. C, 15a).

The opinion of the Circuit Court of Appeals failed to consider the FHWA's reasonable access provisions although those provisions were raised in the Petitioners' brief. The opinion then is contrary both to prior case law and to duly enacted FHWA regulations.

II.

THE HAZARDOUS MATERIALS UNIFORM SAFETY ACT PREEMPTS A LOCAL ZONING ORDINANCE ENFORCED SO AS TO PROHIBIT NIGHTTIME ACCESS TO A TRUCKING TERMINAL LOCATED IN AN ADJACENT MUNICIPALITY.

The HMTUSA contains an express preemption clause which provides, *inter alia* , that a requirement of a state or political subdivision is preempted if ". . . the requirement of the state, political subdivision, or tribe as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter", 49 U.S.C. § 5125 (*See* App. F, 72a). The Plaistow ordinance is being enforced in such a manner as to prevent the movement of hazardous materials from a trucking terminal located in another municipality, the Town of Newton, New Hampshire. If Plaistow can stop the movement of hazardous materials from a point in the next municipality because a few of its residents may suffer some disturbance, then it logically would be allowed to stop the movement of hazardous materials through its area of jurisdiction from any other point outside of its borders to minimize such disturbance. This is not the intent of the HMTUSA. The decision of the Court of Appeals on the HMTUSA issue apparently turns upon the fact that the Petitioners have not met a burden in showing the impact of the

restriction upon the movement of hazardous materials. However, the plain language of the statute says that requirements such as the Plaistow ordinance in question are preempted if "as applied or enforced, it is an obstacle to accomplishing and carrying out. . ." the HMTA. The Circuit Court of Appeals defined the hazardous materials as "Plaistow freight" (*See* App. C, 19a). In fact, the freight is merely moving through the Town of Plaistow to a terminal located totally within another municipality and it is submitted that such regulation must stand upon a different ground than the regulation of a municipality of the activities that occur totally within its own borders.

The primary purpose of Congress in enacting the HMTA and its successor the HMTUSA was to secure a general patten of uniform, national regulations, and thus to preclude a multiplicity of state and local regulations regarding hazardous materials transportation. *National Tank Truck Carriers, Inc, v. Burke,* 335 F. Supp. 509 (D.R.I. 1982), *aff'd,* 608 F.2d 819 (1st Cir. 1979)

In *National Tank Truck Carriers, Inc, v. Burke, id.,* an association of truckers sought to enjoin the State of Rhode Island from enforcing regulations which required a permit to transport liquefied gas along state roads. The permit could be obtained no more than two weeks nor less than four hours before the shipment. Also such transportation was prohibited during the hours 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:00 p.m. Monday trough Friday. The court found that the state regulations were preempted under the provisions of the HMTA. "In addition to causing unnecessary delays, *time restrictions* defeat Congress's intent for uniformity in the transportation of hazardous materials." 335 F. Supp. at 518 (emphasis supplied).

The Court of Appeals distinguished the application of the Plaistow ordinance to the transportation of hazardous materials here because it involved one terminal and was tailored to specific

local conditions. However the Court referred to the "Plaistow terminal" in reaching this conclusion. The Atlas/Olympiad terminal is located in Newton not Plaistow. The Plaistow ordinance is being enforced in a manner to delay shipment of hazardous materials from another municipality into the stream of interstate commerce because a small number of its residents might sometimes be disturbed.

III.

THE ENFORCEMENT OF THE PLAISTOW ORDINANCE IMPEDES INTERSTATE COMMERCIAL TRAFFIC TRAVELING THROUGH THE TOWN WHERE ITS ENFORCEMENT IS PREEMPTED BY OTHER FEDERAL STATUTES AND SUCH ENFORCEMENT VIOLATES THE COMMERCE CLAUSE.

The Plaistow zoning ordinance regulating the ingress and egress of interstate trucks to the Atlas terminal located in Newton, clearly effects and regulates interstate commerce. The enforcement of the Plaistow ordinance is directed at interstate truck traffic passing through rather than originating in the municipality. Where a state or municipality regulates interstate commerce in a way inconsistent with federal law, the state or municipal regulation is preempted. *Hyde Park Partners, L.P.V. Connolly*, 839 F.2d 837, 843 (1st Cir. 1988). The Supreme Court has adopted a balancing test in which the burden imposed upon Interstate Commerce is weighed against "the local interest involved", *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Where "the burden imposed" is clearly excessive in relation to the "putative local benefits" the local restriction will be struck down under the Commerce Clause. *Id.*

The facts as found by the District Court include findings that the Plaistow ordinance places a heavy burden on the interstate

commerce using the Atlas terminal in Newton (*See* App. D, 33a-36a). Many of the trucks used in the terminal arrive from or have a destination in distant points, including Southern California. Also, the standard of delivery in the trucking industry very often requires "just in time" or early morning only delivery. A few of the Plaistow residents residing on or near Kingston Road testified at the trial that they were bothered by the noise and odor of the trucks traveling to and from the terminal. If it is said that the enforcement of this ordinance does not violate the commerce clause, then there is nothing that would stop the Town of Plaistow from banning Interstate trucks from passing through any part of the town if some number of its residents were bothered in some manner by truck traffic.

It must be noted that this case does not involve Plaistow's right, through proper exercise of its zoning authority, to determine whether a *proposed use* of land lying within the town's borders would be allowed. Such a determination, before the building of the terminal and commencement of its operation would not in any way implicate the Commerce Clause. In fact, in this case, prior to the construction of the terminal, the town was approached and asked whether because of the terminal's use of a passage easement in the town, it would exercise any control over the site The town declined to exercise jurisdiction. Plaistow chose not to regulate the use of land within its borders but is now is attempting to control the flow of interstate trucking originating outside of its borders.

Finally, the fact that the STAA and HMTUSA preempt enforcement of Section 1.4 of the Plaistow zoning ordinance, mandates the holding that the enforcement also violates the Commerce Clause. "If a State regulates Interstate Commerce in a manner inconsistent with that described by Congress, the State regulation is preempted by the Federal law, and is therefore constitutionally impermissible". *Hyde Park Partners, L.P.V Connolly, supra,* 839 F.2d at 843.

IV.

IF ENFORCEMENT OF THE PLAISTOW ORDINANCE WAS BASED UPON NOISE OMITTED BY THE TRUCKS ENTERING AND LEAVING THE TERMINAL, IT WAS PREEMPTED BY THE NOISE CONTROLACT.

The District Court allowed Respondent's motion to dismiss (Rule 12(b)(6)) as to Count III to Petitioners' complaint which was based upon the Noise Control Act, 42 U.S.C. § 4901, *et seq.* — specifically § 4917(c) (*See* App. E, 60a-63a). There was,then, no opportunity for the Petitioners to produce evidence on their claim that the enforcement of Section 1.4 of the Plaistow zoning ordinance amounts to the enforcement of noise control regulations on interstate motor vehicles inconsistent with federal regulations. The District Court in dismissing the NCA claim relied principally on *Baltimore & Ohio Railroad v. Oberly,* 837 F.2d 108 (3d Cir. 1988). In that case, the court declined to find preemption as to the nearly parallel provisions of 42 U.S.C. § 4916(c), which pertained to noise omitted from railroads. In that case however, the court specifically found that there was an absence of federal regulation concerning the particular railroad noise omissions in issue there. Unlike the *Baltimore & Ohio Railroad* case, here the EPA has promulgated clear and precise regulations with regard to the highway operations of motor vehicles with gross weights in excess of 10,000 pounds. Regulations are set forth in 40 C.F.R. § 202, and provide in pertinent part as follows:

> (a) No motor vehicle carrier subject to these regulations shall perate any motor vehicle of a type to which this regulation is applicable, which at any time or under any condition of highway trade (sic), load, acceleration or

> deceleration, generates a sound level in excess of 86dB(A) measured on an open sight with fast meter response at 50 feet from the center line of lane of travel on highways with speed limits of 35MPH or less;. . . .

Regulations differ somewhat in regard to trucks manufactured during or after the 1986 model year, but are just as specific in the manner in which the noise levels are regulated. The Court of Appeals relied upon the fact that neither the Plaistow curfew order nor the ordinance it enforces, purport to regulate the decibel levels, exhaust systems, or tires of individual trucks. The court also looked to the language of the original ordinance which includes "odors, dust, smoke, refuge matter, fumes . . . and vibration". The Petitioners never had the opportunity at trial to assert their claim that the true basis of the Town of Plaistow's actions in seeking to limit operations at the terminal was plain and simply noise. It is the *enforcement* of the ordinance (motivated by the noise of the trucks) which the Petitioners assert is preempted by the NCA and they should have been allowed to introduce evidence of such.

CONCLUSION

The decision of the First Circuit Court of Appeals in affirming the District Court's decision denying the Petitioners' relief is improper for several reasons.

The decision of the First Circuit Court of Appeals creates a conflict between the Circuits since all of the previous cases decided on the issue of reasonable access under the STAA hold that the sole basis for denying access is safety considerations. Furthermore the court ignored the regulations promulgated by the Federal Highway Administration in reaching its decision that municipalities could restrict access to interstate trucking terminals for reasons other than safety.

In regard to the Petitioners' claims under the HMTA and its successor the HMTUSA the Court of Appeals failed to give consideration to the fact that the Plaistow ordinance was being used to delay shipments of hazardous materials which merely passed through its jurisdiction. The Court referred to the terminal as the "Plaistow terminal" in its discussion of the hazardous material issue. In fact the terminal is located in Newton, another municipality. Obviously the regulation of freight that is "passing through" a municipality must stand on a different footing from regulation of a terminal area located within its municipal bounds. The court failed to balance the intent of Congress in insuring the uniformity of regulations of hazardous material shipments with the interest of the Town of Plaistow in protecting a limited number of its residents from possible disturbance by nighttime truck traffic.

The court also failed to give due consideration to the fact that the terminal is located in another municipality in deciding the Commerce Clause issue. If Plaistow can ban interstate trucks from passing through its street and ways during certain hours then any city in the United States can ban similar operations solely on the basis that some small number of its citizens is disturbed by truck traffic. This is not the reasonable exercise by the town of Plaistow of its zoning power to regulate trucking operations located within its boundaries which would not run afoul of the Commerce Clause. To the contrary this is exactly the type of local interference in interstate commerce that the Commerce Clause was intended to avoid.

Finally, the Court of Appeals upheld the District Court's dismissal of the Petitioners' claim under the Noise Control Act of 1972. The Court of Appeals relied upon the language of the Plaistow zoning ordinance which includes factors other than noise such as odors, dust and smoke. However the Petitioners were not allowed to produce evidence at trial that noise was the

motivating factor and that *in effect* the local ordinance seeks to mandate lower decibel levels than those set forth by Environmental Protection Agency regulations. The Court of Appeals also failed to consider that the District Court's decision was based upon a misreliance on the decision in *Baltimore and Ohio Railroad v. Oberly, supra.*

Based upon the foregoing, the decision of the Court of Appeals is in error and the Petitioners' respectfully request that it be reversed.

Respectfully submitted,

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Dated: January 22, 1996

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED OCTOBER 25, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-2095

NEW HAMPSHIRE MOTOR TRANSPORT, ET AL.,

Plaintiffs-Appellants

v.

TOWN OF PLAISTOW,

Defendant-Appellee

Before
TORRUELLA, Chief Judge,
ALDRICH, Senior Circuit Judge,
SELYA, CYR, BOUDIN, STAHL and LYNCH,
Circuit Judges.

ORDER OF COURT

Entered: October 25, 1995

The panel of judges that rendered the decision in this case having voted to deny the petitions for rehearing submitted by New Hampshire Motor Transport and Arnold Pevna, et al., and their suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

Appendix A

It is ordered that both suggestions for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

cc: Melinda S. Gehris, Esq.
Mark I. Zarrow, Esq.
Daniel R. Barney, Esq.
Joseph D. Steinfield, Esq.

APPENDIX B — ORDER ON PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED OCTOBER 25, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-2095

NEW HAMPSHIRE MOTOR TRANSPORT, ET AL.,

Plaintiffs-Appellants

v.

TOWN OF PLAISTOW,

Defendant-Appellee

Before

Cyr, *Circuit Judge,*

Aldrich, *Senior Circuit Judge,*

and Boudin, *Circuit Judge.*

ORDER ON PETITION FOR REHEARING

Entered: October 25, 1995

On petition for rehearing, New Hampshire Motor Transport Association has expanded its reliance on an agency regulation touched upon lightly at one point in the original brief. This regulation of the Department of Transportation

states that access review processes adopted by the state shall provide *inter alia* for "denial of access to terminals . . . only on the basis of safety and engineering analysis of the access route." 23 C.F.R. § 658.19 (i)(2)(A). It is apparently the Association's position that this provision represents a controlling agency interpretation of the "reasonable access" provision of the Surface Transportation Systems Act of 1982 to which deference is required under the *Chevron* doctrine. We reject this belated suggestion.

First, the ordinance and order in this case do not "deny . . . access to the terminal"; they impose reasonable restrictions upon it, as the statute itself clearly permits. This is no more an outright *denial* of access than a detour around a school zone or a bridge raised for maritime commerce during rush hour. Nor does the regulation itself even purport to define "reasonable access" as that term is used in the statute; the quoted provision is one element in a check list of elements for state review processes to be established under the regulations.

Indeed, if the regulation were read as the Association intends, there would be a very serious question about its validity. As explained in the panel opinion, the original 1982 statute did not even arguably impose the requirement that all reasonable restrictions on access be based solely on safety; and whatever the precise purpose of the 1984 amendment that emphasized that safety regulations could be imposed on certain tractor-trailers, a drastic recasting of the original "reasonable access" provision is nowhere suggested. Even under *Chevron*, deference to an administrative interpretation is not unlimited.

Second, the implications of the suggested reading of the

regulation, like the suggested reading of the statute, weigh heavily against it. There is no federal regime of zoning or use restrictions that applies to terminals, like the one in this case, located miles from the interstate highway system. Thus, the Association's reading of the statute and the regulation would mean that no one—neither the federal government, nor the states and localities—would have the power to carry on this traditional function of government.

It would be remarkable enough for Congress to determine to transfer such authority *sub silentio* from the states and local governments to federal authorities or for it to empower the Department of Transportation to make such a shift by regulation. What is to us almost inconceivable is that Congress effectively abolished *anyone's* authority to impose reasonable non-safety based restrictions on access to such terminals. The notion that trucking terminals have been completely exempted from regulation that affects every other kind of business in the United States is difficult to take seriously.

The petition for rehearing is *denied.*

By the Court:

FRANCIS P. SCIGLIANO, Clerk

By: s/ Janice M. O'Neil
Chief Deputy Clerk

[cc: Ms. Gehris, Messrs. Zarrow, Steinfield and Barney]

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED SEPTEMBER 20, 1995

United States Court of Appeals
For the First Circuit

No. 94-2095

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL.,

Plaintiffs, Appellants,

v.

TOWN OF PLAISTOW,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Martin F. Loughlin, *Senior U.S. District Judge*]

Before

Cyr, *Circuit Judge*,

Aldrich, *Senior Circuit Judge*,

and Boudin, *Circuit Judge*.

Appendix C

Mark I. Zarrow with whom *Lian, Zarrow, Evnon & Shea* was on briefs for appellants.

Melinda S. Gehris with whom *Marjorie E. Lanier* and *Devine, Millimet & Branch, P.A.* were on brief for appellee.

September 20, 1995

BOUDIN, *Circuit Judge*. This appeal presents a challenge to a town zoning ordinance and cease and desist order that limit night-time access to and from a local trucking terminal. Appellants are the terminal owner, the terminal operator, various interstate motor carriers that regularly use the terminal, and an association representing New Hampshire truckers. Appellee is the Town of Plaistow, New Hampshire, ("the town"), which adopted the restrictions at issue. The terminal is located on a site partly in Plaistow and partly in Newton, New Hampshire.

The trucking terminal began operation in September 1988. It serves as a regional hub for various trucking companies serving the New England area. Line haulers from around the country drop off freight to be delivered in New England and pick up freight whose destination lies outside New England. Atlas Motor Express, Inc. ("Atlas"), the operator of the terminal, maintains a fleet of trucks and provides short haul service within the New England area. The terminal operates 24 hours a day, loading and unloading trailers.

Most trucks that use the Plaistow/Newton terminal reach it from Interstate 495, a federal highway that runs through Massachusetts and near the New Hampshire border. From

Appendix C

Interstate 495, trucks travel about 5 miles on Route 125 to Kingston Road (both are New Hampshire state highways) and then about half a mile to Garland Way, the terminal's private access road. Trucks must travel roughly 2000 feet along Garland Way, the first portion of which passes through the Plaistow residential zone. The terminal's facilities are all located in Newton in an industrial zone bordering on Plaistow.

Shortly after the terminal opened, numerous residents from Plaistow who live along Kingston Road near Garland Way complained about late night truck traffic to and from the terminal. The town subsequently served a cease and desist order on Atlas and the terminal owner, alleging a violation of a Town of Plaistow zoning ordinance that reads in pertinent part:

> Any uses that may be obnoxious or injurious by reason of the production or emission of odors, dust, smoke, refuse matter, fumes, noise, vibration or other similar conditions, or that are dangerous to the comfort, peace, enjoyment, health or safety of the community, whether it contributes to its disturbance or annoyances are prohibited in all districts.

The cease and desist order stated that "heavy commercial trucking arriving at and leaving [the] site is emitting odors, smoke, fumes, noise and vibration around the clock." Despite the order, late night traffic to and from the terminal continued.

The town then brought an action in New Hampshire Superior Court seeking an injunction against the terminal and

an order imposing reasonable hours of operation. The state court entered a preliminary injunction on February 28, 1989, placing a curfew on night-time access to and from the terminal. After an evidentiary hearing, the court entered a permanent injunction on July 7, 1989, limiting the terminal's night-time traffic as follows:

6:00 a.m. to 9:00 p.m.:	No restrictions.
9:00 p.m. to 11:00 p.m.:	Two trucks may arrive or depart.
11:00 p.m. to 5:00 a.m.:	No trucks may arrive or depart.
5:00 a.m. to 6:00 a.m.:	Three trucks may arrive or depart.

The New Hampshire Supreme Court denied the terminal's request for appellate review.

On March 26, 1993, appellants filed a federal suit against the town, alleging that the enforcement of the Plaistow zoning ordinance was preempted by various federal statutes and by the Commerce Clause. U.S. Const., Art. I, § 8. On October 25, 1993, the district court granted the town's motion to dismiss, for failure to state a claim, the appellants' claim that the injunction was preempted by the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq. New Hampshire Motor Transport Ass'n v. Town of Plaistow*, 836 F. Supp. 59 (D.N.H. 1993).

A three-day bench trial followed in August 1994. Thereafter the district court ruled that the injunction limiting night-time access to and from the trucking terminal was not preempted by two other federal statutes invoked by the appellants — the Surface Transportation "Assistance Act of 1982, 49 U.S.C. § 31101 *et seq.*, and the Hazardous Materials Transportation Uniform Safety Act of 1990, 49 U.S.C. § 5101

et seq. — and did not violate the Commerce Clause. This appeal followed. We agree with the district court's determinations and affirm.

1. The town urges that the district court judgment be upheld, without reaching the merits, on the ground that the state court enforcement action is *res judicata* as to all of the appellants. The reach of a prior state court judgment is determined by state law. *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). Under New Hampshire law, we think that the prior judgment does not foreclose the present suit, at least by appellants who were not parties to the state court action.

The only defendants in the state court action were the terminal owner and its operator. Non-parties can be bound where they are in privity with parties to prior litigation, and the privity concept is fairly elastic under New Hampshire law, as elsewhere. But normally something more is required for privity between the prior and present litigants than merely a common interest in the outcome. *Daigle v. City of Portsmouth*, 534 A.2d 689, 694 (N.H. 1987). *See also Gonzalez v. Braco Cent. Corp.*, 27 F.3d 751, 756-63 (1st Cir. 1994) (interpreting federal law).

Here, there is no indication that the appellant interstate carriers even knew of, let alone controlled, the prior litigation. Although the town points out that the same law firm represents all of the appellants, the interstate carriers are not claimed to have controlled or managed the original state court litigation from behind the scenes. *Cf. Montana v. United States*, 440 U.S. 147, 154 (1979); *General Foods v. Massachusetts Dept. of Pub. Health*, 648 F.2d 784, 789 (1st Cir. 1981). It is also

plain that the interstate carriers who use the terminal on a regular basis have a real and distinct interest in nullifying the town's restriction.

Finally, we note that with the exception of the Commerce Clause issue, the federal issues were apparently not litigated in the state court. This would not necessarily defeat a valid claim of *res judicata, see, e.g., Stuhlreyer v. Armco, Inc.*, 12 F.3d 75, 77 (6th Cir. 1993), but it encourages us to resolve any doubts in favor of allowing the carriers to sue. Since the merits must be reached on the appeals by the interstate carriers, we need not consider the stronger claim of foreclosure against the owner and operator of the terminal.

2. Turning to the merits, our review of the district court's preemption analyses is plenary, *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1273 n. 4 (1st Cir.) *cert. denied*, 113 S. Ct. 2987 (1993), and we address in turn each of the statutes relied on by appellants as a separate ground for preemption. Among these, the most important is the Surface Transportation Assistance Act of 1982 ("the Surface Act"), as amended by the Tandem Truck Safety Act of 1984 ("the Tandem Act"), now codified at 49 U.S.C. § 31111 *et seq.* These statutes together establish uniform, national standards for the maximum size and weight of trucks and trailers used in interstate commerce.

As amended, the Surface Act forbids the states from enacting or enforcing laws that prohibit trucks and trailers of approved length and weight from travelling on the national network, *i.e.*, the system of interstate highways and other federally-funded primary routes designated by the Secretary of Transportation. 49 U.S.C. § 31111(e); 23 C.F.R. § 658.5. The Surface Act also prohibits states from denying approved

trucks and trailers "reasonable access" between the national network and "terminals." 49 U.S.C. § 31114. This provision, which is at the heart of this case, reads as follows:

> § 31114. Access to the Interstate System
>
> (a) Prohibition on denying access. A State may not enact or enforce a law denying to a commercial motor vehicle subject to this subchapter or subchapter I of this chapter reasonable access between —
>
> (1) the Dwight D. Eisenhower System of Interstate and Defense Highways (except a segment exempted under section 31111(f) or 31113(e) of this title) and other qualifying Federal-aid Primary System highways designated by the Secretary of Transportation [*i.e.*, the national network]; and
>
> (2) terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading for household good carriers, motor carriers of passengers, or any truck tractor-semitrailer combination in which the semitrailer has a length of not more than 28.5 feet and that generally operates as part of a vehicle combination described in section 31111(c) of this title.
>
> (b) Exception. — This section does not

> prevent a State or local government from imposing reasonable restrictions, based on safety considerations, on a truck tractor-semitrailer combination in which the semitrailer has a length of not more than 28.5 feet and that generally operates as part of a vehicle combination described in section 31111(c) of this title.

The district court ruled that the local curfew did not deny reasonable access to trucks wishing to use the Atlas terminal. The terminal is located between five and six miles from Interstate 495, the nearest juncture with the national network. (Route 125 in Plaistow is not a part of the national network. *See* 23 C.F.R. § 658, app. A (New Hampshire.)) Given this distance, and Plaistow's legitimate interest in curbing noise, odor and dust in its residential areas, the district court found that the night-time restrictions were a reasonable compromise.

On this appeal, the truckers first say that the "reasonable access" provision limits state restrictions to those based on safety. This is a straightforward issue of statutory construction which, absent the "exception" clause quoted above, would easily be resolved in the town's favor. After all, the main provision requires "reasonable access." 49 U.S.C. § 31114(a). "Reasonable" is a comprehensive term, *United States v. Rodriguez-Morales*, 929 F.2d 780, 785 (1st Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992), and nothing in language or common-sense makes reasonableness turn solely on safety considerations.

Context reenforces this view. The "[p]rohibition on denying access," 49 U.S.C. § 31114, extends far beyond the

operation of interstate highways or federally funded state roads that are designated parts of the national network. Local roads and other facilities are also covered by the provision to the extent needed to assure reasonable access to the national network. 23 C.F.R. § 658.19. The guarantee of reasonable access thus has a formidable reach, extending to local regulatory measures that operate miles away from any interstate or national network highway.

Many of these measures are designed to safeguard interests other than safety. Consider, for example, a restriction that routed heavy traffic on a detour of a few miles to assure quiet in a hospital zone. It is difficult to conceive that Congress meant to exclude such a concern from the calculus used to determine whether a restriction infringes on "reasonable access" to the federal highway system. In this instance, language and policy are as one in opposing such a restrictive reading.

The sole argument for limiting the restrictions to safety matters stems from the exception provision, now codified as 49 U.S.C. § 31114(b). As a matter of language, this provision permits, but does not compel, a negative inference that the only restrictions allowed under the main provision are safety restrictions. Because subsections (a) and (b) do not fit neatly together, it is difficult to be absolutely certain of Congress' intent. But for several reasons we reject the suggestion that subsection (b) narrows by inference the concept of reasonableness in subsection (a).

First, the negative inference is flawed as a matter of language. By its terms the safety exception in subsection (b) is concerned not with safety limitations generally but with

restrictions on truck tractor-semitrailer combinations. If the exception were taken to narrow the restrictions permitted under the main "reasonable access" provision, then arguably the *only* restrictions allowed would be safety restrictions directed to truck tractor semitrailer combinations, an extremely odd result.

Second, the original 1982 Surface Act contained the reasonable access language with *no* exception provision; so nothing in 1982 suggested that state access restrictions were limited to those based on safety.[1] If Congress in 1984 had intended to alter the reasonable access provision so as to limit the states to safety restrictions, one might reasonably expect some indication of this purpose at least in the legislative history. *Cf. Sierra Club v. Secretary of Army,* 820 F.2d 513, 522 (1st Cir. 1987). Congress' failure to indicate any such purpose argues against appellants' reading. *Compare* S. Rep. No. 505, 98th Cong., 2d Sess. 1-3 (1984).

The truth is that the legislative history of the exception provision is meager. *See New York State Motor Truck Ass'n v. City of New York,* 654 F. Supp. 1521, 1533 (S.D. N.Y. 1987), *aff'd* 833 F.2d 430 (2d Cir. 1987) (quoting two rather

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1. Section 412 of the Surface Act, 96 Stat. at 2160, provided:

> No State may enact or enforce any law denying reasonable access to commercial motor vehicles subject to this title between (1) the Interstate and Defense Highway System and any other qualifying Federal-aid Primary System highways as designated by the Secretary, and (2) terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading for household goods carriers.

uninformative sentences). Among other changes in 1984, Congress expanded somewhat the protected radius in which truck tractor-semi trailers could operate to include their points of loading and unloading. Since this was a concern to state officials, S. Rep. No. 505 at 1-3; 654 F. Supp. at 1531, Congress evidently balanced this change by adding subsection (b) as a counter-weight.

We appreciate that, as appellants point out, three district courts have made references to the "reasonable access" provision as one directed to safety.[2] But the state restrictions with which those cases were concerned were wholly different from and far more intrusive than the Plaistow ordinance and order, including blanket limitations on the distance vehicles could freely travel off the national network and burdensome prior approval provisions for the use of local roads. *See* 681 F. Supp. at 339-40; 654 F. Supp. at 1529-30; 647 F. Supp. at 1484-88. Safety is obviously a paramount reason for limiting access; but, in our view, it is not the only reason permitted by Congress.

Having concluded that the district court correctly construed the Surface Act, we have no occasion to review the court's further, fact-specific decision that the Plaistow restrictions in this case did permit reasonable access. The appellants scarcely bother to argue the point; in a couple of sentences, they simply assert that the district court findings

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2. *A.B.F. Freight System, Inc. v. Suthard*, 681 F. Supp. 334, 341 (E.D. Va. 1988); *New York State Motor Truck*, 654 F. Supp. at 1539; *Consolidated Freightways Corp. of Delaware v. Larson*, 647 F. Supp. 1479, 1483-84 (M.D. Pa. 1986), *rev'd on other grounds*, 827 F.2d 916 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988).

show that a truck terminal must operate 24 hours a day. The opinion does not making such a finding, and we think appellants' cursory argument waives the factual issue in this case. *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.), *cert. denied,* 494 U.S. 1082 (1990).

3. The truckers next contend that the curfew violates the Hazardous Materials Transportation Uniform Safety Act of 1990 ("the Materials Act"), 49 U.S.C. § 5101 *et seq.* The Materials Act establishes uniform, national rules for the transportation of hazardous materials and, together with its accompanying regulations, creates an elaborate scheme for the designation, handling, packaging, labeling, and shipping of hazardous materials. Like the Surface Act, the Materials Act contains an express preemption clause, which reads in relevant part as follows:

> § 5125. Preemption
>
> (a) General. — Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if —
>
> (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or
>
> (2) the requirement of the State,

> political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

The truckers contend that the curfew is preempted by the second provision of the general preemption clause, because it interferes with "the federal speedy-transport mandate," *N.H. Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 51 (1st Cir. 1984), codified at 49 C.F.R. § 177.853(a): "[a]ll shipments of hazardous materials shall be transported without unnecessary delay, from and including the time of commencement of the loading of the cargo until its final discharge at destination." Much of the Plaistow freight is classified as hazardous. Because the Plaistow curfew necessarily entails a delay for hazardous materials, the truckers say that it violates the Materials Act.

By using the word "unnecessary," the regulations indicate that some delays are necessary and acceptable. *See National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270, 275 (2d Cir. 1982) (construing prior version of statute). Once again, appellants make little effort to show that on the present record the specific curfew requirements imposed by Plaistow create any risk to the drivers of the trucks, other highway traffic, Plaistow or any other community. The substance of the appellants' brief on appeal is that any regime that creates a possibility of a 12-hour delay in delivery *ipso facto* automatically imposes "unnecessary" delay.

A general, state-wide restriction is obviously more vulnerable to attack both because its impact is likely to be

much greater and because it treats alike all situations regardless of need or danger. *See A.B.F. Freight System*, 681 F. Supp. at 345. Quite possibly a local restriction might also unjustifiably interfere with hazardous shipment movements, either standing alone or in combination with restrictions in other communities. But the burden is upon those who attack the restriction is show the impact. At least on this appeal, appellants have not even attempted a serious fact-specific showing.

This case is quite unlike *National Tank Truck Carrier, Inc. v. Burke*, 698 F.2d 559 (1st Cir. 1983), in which we affirmed a decision striking down Rhode Island's state-wide curfew and permitting procedure for transporting certain liquid gas on any Rhode Island roadway. By contrast, the curfew at issue here involves one terminal, is tailored to specific local conditions, and imposes no time restriction on the delivery of hazardous materials in New Hampshire so long as the Plaistow terminal is not used as a point of interchange.

4. The truckers also challenge the district court's dismissal of their claim under the Noise Control Act of 1972 ("the Noise Act"), 42 U.S.C. § 4901 *et seq.* 863 F. Supp. at 67-68. That statute created a federal regulatory scheme to set noise emission levels for motor carriers engaged in interstate commerce. Because the curfew was imposed in part to eliminate the noise caused by trucks, the truckers say that it is preempted by the Noise Act.

The federal noise regulations pertaining to motor carriers do nothing more than set minimum and maximum decibel levels and exhaust system and tire standards for trucking equipment that may operate on public roadways. 40 C.F.R.

§§ 202.20-202.23. Accordingly, no state or town may set different decibel levels for motor carriers operating within its jurisdiction. But neither the Plaistow curfew order nor the ordinance it enforces purports to regulate the decibel levels, exhaust systems, or tires of individual trucks. Rather, noise levels were one element of an equation that also included "odors, dust, smoke, refuse matter, fumes . . . and vibration" and that prompted a limitation on operating hours for one specific site.

The Noise Act preemption clause underscores the limited reach of that statute. It provides in relevant part as follows:

> [A]fter the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any motor carrier engaged in interstate commerce, no State or political subdivision thereof may adopt or enforce any standard applicable to the same operating of such motor carrier, unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

42 U.S.C. § 4917(c)(1). Admittedly, the statutory language is general ("any standard applicable to the same operation"); but we think that it would stretch the words beyond their ordinary meaning to strike down a local curfew order based on a range of concerns where federal law regulates only the decibel levels of the equipment. The Noise Act was not designed to remove all state and local control over noise; on the contrary, the

statute says that "primary responsibility for control of noise rests with State and local governments. . . ." 42 U.S.C. § 4901(a)(3).

5. Finally, appellants argue that the Plaistow curfew is preempted under the Commerce Clause itself even if it does not offend any of the individual statutes relied upon by appellants. Since Congress has enacted its own legislative test for this case ("reasonable access"), one might ask whether it is proper for the courts to resort separately to the more general Commerce Clause rubrics. *Cf. White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1993). Be that as it may, applying the general Commerce Clause tests does not alter the result.

Absent any statute at all, the courts ask — in a case not involving discrimination against interstate commerce — whether "the burden [on interstate commerce imposed by the local restriction] is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The district court found no violation in this case. Even if we reviewed this fact-specific legal determination *de novo, cf. Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 & n.17 (1984), our conclusion would be the same.

Starting with "burden," in this case a night-time curfew prevents arrivals and departures at one terminal, at one location in the state, during six late-night hours (from 11 p.m. to 5 a.m.) with lesser restrictions for three hours (from 5 a.m. to 6 a.m. and from 9 p.m. to 11 p.m.). For 15 hours of the day (from 6 a.m. to 9 p.m.), there are *no* limitations. The curfew does disadvantage this terminal *vis-a-vis* other terminals not

so restricted, and somewhat impairs its profits; but the magnitude of the disadvantage is not easy to isolate.

The evidence showed that customers often want early morning delivery, and in some cases the curfew does limit the ability of the Plaistow/Newton terminal to make such deliveries. On the other hand, there is no indication that customers cannot be served from other terminals or that the flow of commerce into and out of New Hampshire is seriously affected. No state wide restriction is involved, *compare Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), nor is a major artery of commerce severely constricted, *compare Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

On the other side of the scale, the impact on local residents is not some remote or conjectural specter. The curfew order was obtained only because of local experience with the terminal; and residents testified at trial about the effect on their lives of unrestricted deliveries. The curfew is akin to zoning and traffic restrictions traditionally applied on a local level, *cf. Christensen v. Yolo Cty. Bd. of Supervisors*, 995 F.2d 161, 166 (9th Cir. 1993); *Interstate Towing Ass'n, Inc. v. Cincinnati*, 6 F.3d 1154, 1163-65 (6th Cir. 1993), and there is no regulation by federal authorities that provides substitute protection.

In sum, the burden of the curfew on interstate commerce has not been shown to be excessive in relation to the benefits. Congress has great latitude to order preemption, and calibrate it with precision, based on a legislative judgment that local regulation threatens interstate commerce. The dormant Commerce Clause, by contrast, is a fairly blunt instrument;

and absent discrimination, courts may reasonably insist on a fairly clear showing of undue burden before holding unconstitutional a traditional example of local regulation. *See Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443-44 (1978). That showing has not been made on the record before us.

Affirmed.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED SEPTEMBER 19, 1994

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

#C-93-149-L

N.H. Motor Transport, et al.

v.

Town of Plaistow

ORDER

The plaintiff, New Hampshire Motor Transport Association is an unincorporated trade association which represents the interests of New Hampshire Motor Carriers who are members.

Plaintiff Arnold Pevna, Trustee of Olympiad Realty Trust, is the owner of a parcel of land located partially in the town of Newton and partially in the town of Plaistow upon which a trucking terminal is located, which is leased to Atlas Motor Express, Inc.

Plaintiff, Atlas Motor Express, Inc. is a certificated interstate motor carrier, which leases the trucking terminal owned by Olympiad.

The plaintiffs, Engle Oostdyke, Inc., Gerard Express, Inc., Peterri Transportation Co., Inc., Wolf Trucking Inc., and Ivan Bondy are certified interstate motor carriers, with

principal places of business in Bensalem, Pennsylvania, South Kearney, New Jersey, Los Angeles, California, and Hemet, California respectively. Each of the named motor carriers maintains trucks that make use of the Atlas terminal on a routine basis.

The Defendant, Town of Plaistow, is a Municipal Corporation established under the laws of the State of New Hampshire, and at all times relative hereto, has in effect a zoning ordinance pursuant to the provisions of N.H. Rev. Stat. Ann. §§ 672, 677 (1986).

Atlas is a New Hampshire business corporation which has been engaged in the trucking business since 1983.

Atlas first operated out of a terminal located in Haverhill, Massachusetts and in 1986 moved to a terminal building located in the Town of Plaistow where it operated until it moved to its current terminal in September, 1988.

Arnold Pevna and his wife are the owners of Olympiad Realty Trust. Atlas is owned by their three sons. Arnold Pevna operated a company known as East-West consolidators which arranges freight transportation but which runs no trucks of its own.

In May of 1987 Olympiad entered into a purchase and sale agreement to purchase a parcel of land consisting of approximately eight acres, located in Newton and Plaistow, where the Atlas trucking terminal is now located. The agreement was contingent upon getting all necessary approvals from the towns of Plaistow and Newton to construct a trucking terminal.

Appendix D

On October 29, 1986 legal counsel for Atlas corresponded with the Plaistow Planning Board inquiring as to whether the plans for the proposed trucking terminal facility needed to be reviewed by the Plaistow Planning Board and whether there were any potential problems.

At the June 24, 1987 meeting of the Plaistow Planning Board the Board reviewed the plans for the proposed terminal and indicated in its minutes that Atlas did not have to come before the Board.

On July 17, 1987 the Plaistow Planning Board through its administrative assistant wrote a letter confirming its actions at the June 24 meeting stating that "since the proposed site was entirely in Newton and, with access off Kingston Road through a private drive with passage easement, this plan does not require a public hearing in this town."

Olympiad subsequently went through the site plan approval process with the Newton Planning Board. Owners of adjacent residential properties in Plaistow were notified and appeared at the meetings in opposition to the project. Site plan approval was ultimately granted.

Frederick Royer who lives at 48 Kingston Road, Plaistow attended two meetings in the Town of Newton, but was not notified of other hearings. Royer and other abutters objected to the operation of the terminal during night hours specifically between 7:30 p.m. and 5:30 or 6:00 a.m.

Three owners of properties located along Kingston Road in Plaistow brought a Writ of Certiorari in Rockingham County Superior Court seeking to vacate the Newton Planning Board's approval of the Atlas terminal project.

Appendix D

The Writ of Certiorari was settled. As part of the settlement, the passage easement was paved and trees were planted to act as a noise buffer between the terminal and contiguous residential property.

On February 10, 1988 Olympiad acquired title to the proposed site in a deed recorded at Rockingham County Registry of Deeds Book 2727, Page 418.

Olympiad then obtained construction financing and built the presently existing terminal at a total cost of approximately $1,000,000.00.

Although there were meetings between abutters and Plaistow selectmen with regard to the Atlas terminal no remedial action was taken by the Town of Plaistow. Plaistow felt that it had no jurisdiction as the terminal was located in Newton. Atlas had no notice of these meetings which appeared to be impromptu.

Atlas began operations at the terminal in September, 1988. Residents who own property abutting Kingston Road again filed complaints with the Board of Selectmen of the town of Plaistow relating to the trucking activity at the Atlas terminal.

On October 7, 1988 the town of Plaistow served a cease and desist order upon "Arnold Pevna d/b/a Atlas Trucking" for violation of Article 1 Section 1.4 of the Plaistow Zoning Ordinance.

Section 1.4 of the Plaistow Zoning Ordinance states as follows: "Any uses that may be obnoxious or injurious by

reason of the production or emission of odors, dust, smoke, refuse matter, fume, noise, vibration or other similar conditions, or that are dangerous to the comfort, peace, enjoyment, health or safety of the community, whether it contributes to its disturbance or annoyance are prohibited in all Districts."

Atlas and the other truckers who use the terminal continued to conduct their trucking operations until February of 1989 when Plaistow brought a Petition in Rockingham County Superior Court seeking temporary injunctive relief.

On February 28, 1989 the Superior Court amended its temporary order enjoining truck traffic at the terminal between the hours of 7:30 p.m. and 6:30 a.m.

On March 7, 1989 the Superior Court amended its temporary order so as to allow one truck to leave the terminal at or after 5:15 A.M. on weekdays and two more trucks to leave on or after 5:45 P.M. The amended order also allowed trucks unlimited access to the terminal until 9:00 P.M.

In September, 1989 after a trial on the merits the Superior Court issued an order permanently restricting access to the terminal by truck traffic as follows:

6:00 A.M. — 9:00 P.M. — No restrictions
9:00 P.M. — 11:00 P.M. — Two trucks may arrive or depart
11:00 P.M. — 5:00 A.M. — No trucks may arrive or depart
5:00 A.M. — 6:00 A.M. Three trucks may arrive or depart.

The Rockingham County Superior Court has indicated that the last court order will not be modified.

Appendix D

The Site

The parcel on which the trucking terminal sits is located partly in an industrial zone in the Town of Newton and partly in a residential zone in the Town of Plaistow. In the Town of Plaistow, the terminal is located adjacent to both the industrial and residential zone. A lumber yard and wood dry kiln are located entirely in the Town of Plaistow and are adjacent to the terminal site located in the industrial zone. The trucking terminal and the kiln share access to Kingston Road over a private way which is located partly in the residential zone and sometimes is known as Garland Way. The residential zones located in both Plaistow and Newton are located at varying distance from Kingston Road and require access through the Plaistow residential zone.

The kiln/lumber yard has been located at its site in Plaistow for in excess of twenty years and has been serviced by large tractor-trailer rigs which hauled lumber to and from the site. A railroad line passes nearby and the kiln site is serviced by a railroad spur.

A portion of Garland way (the 2090 feet closest to Kingston Road) passes through a residential zone located in the town of Plaistow.

Garland Way accesses onto Kingston Road, which is a state highway, located in the town of Plaistow. Kingston Road was State Route 125 until the present Route 125 was constructed in 1952. Kingston Road is heavily travelled and is used by numerous trucks in addition to the trucks using the Atlas terminal.

Appendix D

The access into the terminal from Kingston Road is .6 miles from Route 125.

The Royers, Frederick and Denise, Paul Holmes and Laura Cafisco testified about the noise conditions, and odors from the truck traffic which was especially irritating at night. Their frustration was quite evident at trial. Presumably on advice of counsel diaries of events pertaining to truck traffic at night were made by Paul Holmes, Laura Cafisco and Denise Royer. Denise Royer quite cogently stated that she could not cope after awhile with having pencil and pad poised in her hand over a period of some years to record violations of the Rockingham County Court order later to be used as evidence.

Trucking Operations at the Terminal

The court took a view of Kingston Road, Garland Avenue, the trucking terminal outside view of the Royer and Holmes residence, outside and inside view of the Cafisco residence and a view of the former terminal of Atlas with contiguous areas. Additionally, while in the Cafisco residence a demonstration for the court's edification was made by having an Atlas truck drive by and then make a return trip by the Cafisco Residence. A view can be considered as evidence. *Chouinard v. Shaw,* 99 N.H. 26 (1954).

The Atlas trucking operation involves three areas. Customers have Atlas pick up freight within Atlas' operating area which is New England and then deliver it. A line hauler or third-party motor carrier outside New England, a great proportion of which come from Southern California haul to the Atlas terminal. Atlas will then re-deliver it within the New England area. Atlas business also involves "freight assembly."

Appendix D

Atlas trucks pick up freight within New England, assemble the freight at its terminal where it is then loaded onto line hauler trucks for delivery outside New England.

Trucks use Kingston Road which was formerly Route 125 and then turn onto Garland Road for ingress or egress to the trucking terminal.

The freight is shipped in tractor trailers, tandem tractor trailers, and smaller trucks which do not involve a tractor. The vehicles can vary in weight from 33,000 pounds to heavier line haul vehicles which can be as heavy as 80,000 pounds.

David Pevna, one of the three brother owners of Atlas stated that there was only sporadic need of trucks arriving at the terminal between 11:00 p.m. and 5:00 a.m. Evidence elicited from abutting owners belie that fact as there has been and continues to be many violations of the Rockingham County court order.

While the court has empathy for the position of Atlas in its efforts to run a viable business in the highly competitive trucking business, this has to be balanced with the interests of abutting landowners in a residential area. Very poignant is the predicament and testimony of Paul Holmes. Mr. Holmes has lived in Plaistow most of his seventy-two years. The past thirty years he has resided at 55 Kingston Road. His home is only thirty-two feet from the roadway and he has various medical ailments which are exacerbated by noise, odor and dust as trucks pass his home.

The remedial action taken by Atlas rings somewhat hollow with respect to violations by line haulers usually from

California. The gate at the trucking terminal is closed from 11:00 p.m. until 5:00 a.m. Albeit, the following scenario may take place. The line haulers and other vehicles arrive within the prohibited hours and have the following alternatives: sleep in their trucks until 5:00 a.m., return down the road to get something to eat and perhaps come back again or just leave and go to a rest area until 5:00 or 6:00 p.m. and then return. No matter what the alternative, this does not alleviate the problems of abutting landowners. Albeit trucks are still coming or going to the terminal at prohibited times. The court understands that weather conditions, traffic, delays at weigh stations and road detours can delay trucks. The court is also aware that many different drivers are used in long hauls, but an admonition to the companies involved that if vehicles cannot arrive at the terminal before 11:00 p.m. and 5:00 a.m. they should go elsewhere is not unreasonable.

Approximately 50% of the trailer loads going in and out of the Atlas terminal contain some items which are defined as hazardous materials under the Hazardous Materials Transportation Uniform Safety Act, 49 U.S.C. § 1801 and the regulations promulgated thereunder. Atlas has applied for and received from the United States Department of Transportation a Hazardous Materials Certificate of Registration. The restrictions on access to the Atlas terminal cause delays in the shipment of some of the hazardous materials.

The freight arrives at the terminal for the most part, by exiting from Route 495 and traveling along Route 125 into Plaistow to Kingston Road, where a turn is made onto Garland Way. The trucks for the most part, proceed in a southerly direction down Kingston Road until they reach the Atlas terminal located approximately six tenths of a mile over the

road from Route 125 and 5.5 miles over the road from Route 495. Typically, a loaded tractor trailer arrives at the terminal in the late afternoon or early evening.

Upon arrival at the terminal, trucks loaded with the day's pick-ups are unloaded onto the loading platform and sorted by geographic area. When all trucks are unloaded, they are then reloaded with deliveries destined for a specific geographical area. This process goes on throughout the nighttime hours. Typically trucks leave in the early morning in order to meet the customers delivery requirements.

Atlas' gross sales have increased in the last several years and the increase in gross sales has been accompanied by an increase in trucking traffic in and out of Atlas' terminal located in Newton, New Hampshire by both Atlas and line haul trucks.

The court accepts Atlas' contention that while its gross sales have dramatically increased since 1988 from $2,037,344.00 to $5,027,344.00 in 1993 there was not a commensurate increase in net profits. The salaries that the three Pevna brothers draw which is approximately $600.00 weekly are not exorbitant, but actually appear to be parsimonious.

The standard margin of profit for a trucking operation similar to Atlas in New England is 4-5%. Atlas' margin of profit in the years 1988 through 1993 never exceeded .4%. In 1993 a loss of 1.8% was incurred,

Further the court finds that limiting the hours of operation undoubtedly has had some impact on the profitability of Atlas.

Appendix D

The general business climate in New England has been untoward during the past six years due to decline in manufacturing which has also affected small companies like Atlas.

The trucks arriving at the Atlas terminal in connection with the freight assembly portion of its business are often "long haul" trucks, meaning that they come from a great distance. Often trucks such as the Wolf Trucking and Ivan Bondy trucks come from as far away as Southern California.

These long haul trucks almost exclusively use Interstate Route 495 and invariably use Route 125.

The freight that is shipped to the Atlas terminal, comes both from the New England states via Atlas Trucks and from remote locations throughout the United States via "line haul" trucks.

The assembly and distribution portion of Atlas' business (which involves long haul trucks) is especially time sensitive. A majority of Atlas' customers, both in manufacturing and in retail, are involved in what is known in the business as "just in time" delivery or "zero inventory" control. "Just in time" means that Atlas' customers do not stock any more inventory than is absolutely necessary for running their business. The customers do not hold inventory and only order goods on an "as needed" basis. Many of the Atlas customers are located several hours from the Atlas terminal. "Just in time" or "zero inventory" means that inventory must be delivered on the morning of its use. Therefore, it is often necessary for Atlas trucks to leave the terminal in the early hours of the morning in order to accomplish delivery to its customer for use on that

same day. Restrictions on the hours of operation of the terminal limit Atlas' ability to comply with its customers' requirements to receive deliveries "just in time." Additionally, many retail customers require Atlas to deliver in the early morning because of time restrictions placed upon deliveries at Shopping Malls. Again most customers are located several hours from the Plaistow terminal. The restrictions upon Atlas' hours of operation limit the "stem time" (being the time it takes to travel from the terminal to the customer) which inhibits Atlas' ability to comply with "just in time" and "early morning only" delivery requirements.

The time pressures placed upon Atlas are common to the trucking industry in general.

If Atlas is unable to make an early delivery or a late pick-up because of the access restriction it will not just lose that delivery but will in all likelihood lose the entire business of that customer because shippers tend to use only one trucking company so as to facilitate service and to get volume discounts.

Atlas and other truckers using the terminal have violated the terms of the Rockingham County Supreme Court access restriction.

There was evidence presented that most competitors of Atlas are able to operate 24 hours a day. There was also evidence that Roadway Trucking located in Londonderry, New Hampshire was restricted from using one road to its terminal because it was in a residential area. There was further evidence that other roads leading to the terminal were not restricted between the hours of 9:00 p.m. and 6:00 a.m.

Appendix D

Ross terminal in Penacook, New Hampshire, for a time had restrictions on hours of operation, but allegedly was able to purchase complaining residential landowners property and thus allowed to have unrestricted hourly access to its terminal.

Two trucking terminals located in Avon and Norwood, Massachusetts also have nightime hourly restrictions.

The standard delivery service expected of truckers operating in New England is "overnight" or "next day" delivery. This means that when freight arrives at the Atlas terminal it is expected to be delivered the next day and often customers require delivery the next morning.

Atlas has lost customers and has been unable to take on other customers because of the access restrictions imposed upon the terminal by the town of Plaistow.

It is sometimes necessary to have trucks enter and leave the terminal during the restricted hours in order to provide the level of service that is demanded by customers and that is standard in the trucking industry.

Discussion

The plaintiff contends that the enforcement of Section 1.4 of the Town of Plaistow's Zoning Ordinance which forbids access to the Atlas terminal during certain nighttime hours violates the following laws.

49 U.S.C. § 2312 of the Surface Transportation Assistance Act, violation of the Hazardous Materials Transportation Uniform Safety Act and an excessive burden

upon interstate commerce in violation of Article 1, §8, Clause 3 of the United States Constitution.

Without a doubt the court heard much of the same evidence presented to Superior Court Judges Perkins and Holman relative to the Plaistow zoning ordinance.

From plaintiff's perspective it was unfortunate that prior to Atlas' moving from its prior location at its Plaistow site because of lease problems, that it was unable to resolve with Plaistow whether the zoning board would require a site review. On the other hand one cannot say that the Plaistow Zoning Board acted unreasonably in determining that it had no jurisdiction as the terminal was located in Newton, an adjoining town. The town also relied upon advice of its counsel Attorney Kalman.

Reference is made to docket entry #19, dated February 28, 1994. This was an order of this court denying defendant's Motion for Partial Summary Judgment. The court in denying the motion stated that the case was not res judicata as there was not an identity of the cause of action in both the earlier and later suits. As stated in the order, a federal court must accord a state court judgment the same preclusive effect which it would be given under the laws of the state where judgment was entered. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81 (1983). For what it is worth after hearing much of the same evidence that was presented to the Rockingham County Superior Court the court agrees with its findings.

The court next addresses plaintiff's contention that current enforcement of the Rockingham County decree denies reasonable access to the terminal in contravention of 49

Appendix D

U.S.C. § 2312 entitled the Surface Transportation Assistance Act.

49 U.S.C. §2312 states:

Access to the Interstate System

(a) No State may enact or enforce any law denying reasonable access to commercial motor vehicles subject to this title between (1) the Interstate and Defense Highway System (other than any segment thereof which is exempted under section 411(i) or 416(e) of this title [49 USCS Appx. 21211(i) or 2315(e)]) and any other qualifying Federal-aid Primary System highways, as designated by the Secretary, and (2) terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading for household goods carriers and for any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 1/2 feet and which generally operates as part of a vehicle combination described in section 411(c) of this Act [49 USCS Appx. § 2311(c)].

(b) Nothing in this section shall be construed as preventing any State or local government from imposing any reasonable restriction, based on safety considerations, on any truck tractor-semitrailer combination in which the semitrailer has a

> length not to exceed 28 1/2 feet and which generally operated as part of a vehicle combination described in section 411(c) of this Act [49 USCS Appx. § 2311(c)].

Acting pursuant to its constitutional power to regulate commerce among states Article I, section 8 of the Constitution, Congress has on occasion enacted laws that directly affect use of the national network of highways commonly referred to as interstate highways. *New York State Motor Truck Ass'n v. City of New York*, 654 F. Supp. 1521 (S.D.N.Y. 1987), affirmed 833 F.2d 430 (1987).

In *New York State Motor Truck Ass'n, supra*, the City of New York sought to restrict use of tandem trailers on city interstate highways to certain hours of the day. The court, in granting a preliminary injunction noted that:

"If New York State (or New York City) possess the power to limit federally approved tandems' use of Interstate highways within their borders, then other adjoining states, in this case New Jersey and Connecticut, would possess similar powers to limit the hours of operation of tandems on interstate highways within their borders. The potential for paralysis of federally approved tandems is manifest."

In this case there has been a minor conflict in the evidence relative to the distance from Interstate Highway 495 (which runs in a general easterly and westerly direction in the commonwealth of Massachusetts) to the plaintiff's terminal. Testimony varied from a minimum mileage of 5.1 miles to a maximum mileage of six miles. Upon leaving Route 495 at the Plaistow exit to drive to the plaintiff's terminal, Route 125 is

the most direct route. Somewhat unbelievable, but apparently true was evidence that Route 125 which this court thought was a major New Hampshire artery or highway linking the Massachusetts border to Rochester, New Hampshire was not part of the National Highway System. Its omission was perhaps inadvertent and there was evidence presented that the New Hampshire Legislature may remedy this omission, but this will not be in the immediate future.

Unlike the *New York State Motor Truck Ass'n* case, *supra*, where the City of New York attempted to limit hours in which tandem trailer could traverse city interstate highways, Interstate 495 does not run through the Town of Plaistow. Direct access or egress to Route 495 in Haverhill, Massachusetts is not being denied to the plaintiff. Plaintiff's trucks or other trucks traveling to or from the terminal have to travel 5 to 6 miles along Garland Way, Kingston Road and Route 125 before arriving at Route 495. Defendant Town of Plaistow has a valid and reasonable ordinance enforcing noise and odor control within its residential limits. The Rockingham County Superior Court, after careful consideration and reconsideration in well-reasoned decrees by two different judges reached an equitable compromise. Considered were the exigencies of plaintiff's business and the equal rights of adjoining landowners in the enjoyment of their homes.

The defendant also alleges that the decree of Rockingham County Superior Court is res judicata with respect to the commerce clause claim. The court does not address this issue as the court finds no violation of the commerce clause in the context of the federal case.

Appendix D

Hazardous Materials Handling Act

It is the further claim of the plaintiff that enforcement of 1.4 of the Plaistow Zoning Ordinance so as to forbid access to the Atlas terminal during nighttime hours has the effect of delaying shipment of hazardous materials in violation of the Hazardous Materials Transportation Uniform Safety Act and the regulations promulgated pursuant thereto.

49 U.S.C. § 1801 provides:

> The Congress finds that:
>
> 1. The Department of Transportation estimates that approximately 4 billion tons of regulated hazardous materials are transported each year and that approximately 500,000 movements of hazardous materials occur each day.
>
> 2. Accidents involving the release of hazardous materials are a serious threat to public health and safety.
>
> 3. Many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting,

routing, notification, and other regulatory requirements.

4. Because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable.

5. In order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials is necessary and desirable.

6. In order to provide reasonable, adequate, and cost-effective protection from the risks posed by the transportation of hazardous materials, a network of adequately trained State and local emergency response personnel is required.

7. The Office of Technology Assessment has estimated that approximately 1,500,000 emergency response personnel need better basic or advanced training for responding to the unintentional release of hazardous materials at fixed facilities and in transportation, and

> 8. the movement of hazardous materials in commerce is necessary and desirable to maintain economic vitality and meet consumer demands, and shall be conducted in a safe and efficient manner.

In *Borough of Ridgefield v. New York Susquehana & Western Railroad*, 810 F.2d 57 (3rd Cir. 1987) the court dismissed an action brought under the Hazardous Materials Transportation Act by municipalities stating that no private right of action exists under the act.

Congress enacted the HMTA to vest the Secretary of Transportation with the authority necessary to coordinate federal efforts in the regulation of hazardous materials' transportation. The court declined to add an implied private right of action to the statute's specified enforcement provisions.

The Hazardous Material Transportation Act empowers the Secretary of Transportation "to protect the Nation adequately against the risks of life and property which are inherent in the transportation of hazardous materials in commerce." *City of New York v. United States Department of Transportation*, 715 F.2d 732 (1983).

There is a paucity of law regarding the Hazardous Material Transportation Act. The primary Congressional purpose intended to be achieved through Hazardous Materials Transportation Act was to secure general pattern of uniform, national regulations, and thus to preclude multiplicity of state and local regulations in the area of hazardous materials transportation. *National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819 (1st Cir. 1979).

Appendix D

The hazardous materials, paints and solvents which are hauled to the Atlas terminal are of the lesser noxious types, unlike nuclear waste, for example. There are on occasion ten or twelve hour delays in delivery if the mode of transportation has to wait outside the terminal until it opens. There is also a question unanswered in this circuit on whether Atlas can bring a private right of action under the Act. *See Ridgefield, supra* (private action could not be brought).

To recapitulate. The court has empathy with the respective positions and problems that the plaintiff has, the Town of Plaistow and just as importantly the residents along Kingston Road who have suffered inconveniences of having truck traffic traveling by their homes in contravention of the Rockingham County decree.

The court does not find that enforcement of Section 1.4 of the Town of Plaistow's Zoning Ordinance violated either the Hazardous Materials Transportation Uniform Safety Act 49 U.S.C. § 2312 or was an excessive burden upon interstate commerce in violation of Article 1, § 8, Clause 3 of the United States Constitution. Further the court in view of its ruling for the defendant does not address the issue of res judicata or collateral estoppel.

September 19, 1994

s/ Martin F. Loughlin
Martin F. Loughlin
Senior Judge

Daniel T. Chabot, Esq.
William J. Barron, Esq.
Sumner F. Kalman, Esq.
Andrew D. Dunn, Esq.

APPENDIX E — ORDER ON MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED OCTOBER 25, 1993

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

#c-93-149-L

New Hampshire Motor Transport Association, et al.

v.

Town of Plaistow

ORDER ON MOTION TO DISMISS

Procedural History

On March 26, 1993, plaintiffs, New Hampshire Motor Transportation Association et. al. ("NHMTA"), filed a complaint against the defendant, the Town of Plaistow, New Hampshire (Plaistow). NHMTA and various interested parties allege that their federal constitutional rights have and continue to be violated by the enforcement of a local ordinance which, as a result of a New Hampshire Superior Court permanent injunction, limits the access to its Newton, N.H. terminal during certain delineated time periods. Specifically, NHMTA alleges that Plaistow Zoning Ordinance § 1.4 directly violates 49 U.S.C. § 2301 et seq., entitled the Surface Transportation Assistance Act (count I); 49 U.S.C. § 1801 et seq., entitled the Hazardous Materials Transportation Uniform Safety Act (count II); 42 U.S.C. § 4901 et seq., entitled the Federal Noise Control Act (count

III); and the Commerce Clause of the United States Constitution (count IV). As a result of these alleged violations, NHMTA argues that § 1.4 is preempted pursuant to the Supremacy Clause of the United States Constitution and is therefore unenforceable as applied to its operations (count V). In NHMTA's complaint, declaratory relief and damages are sought.

On April 15, 1993, Plaistow answered NHMTA's complaint and specifically asserted that the principles of collateral estopped, res judicata; lack of standing, and failure to state a cause of action with regard to the preemption claims entitle it to a dismissal. Plaistow then filed a Motion to Dismiss on August 25, 1993 with accompanying memorandum alleging only that, under Fed. R. Civ. Pro. 12(b)(6), the preemption claims of NHMTA should be dismissed for failure to state a claim upon which relief can be granted.

NHMTA filed its Objection to Defendant's Motion to Dismiss with accompanying memorandum on September 7, 1993. Plaistow followed this up with a Reply to Plaintiff's Objection to the Defendant's Motion to Dismiss filed on September 14, 1993. The Court will now address only those issues raised in the Motion to Dismiss and corresponding pleadings leaving other issues not asserted in such motion to be decided at trial.

Factual Background

In 1985, Arnold Pevna, as trustee of Olympiad Realty Trust ("Olympiad"), entered into an agreement to purchase a certain parcel of land located partially in Newton, N.H. and

partially in Plaistow, N.H. Olympiad's plans were to build a trucking terminal to be located entirely in Newton with access via a private and public way each located in Plaistow. In 1986, Olympiad contacted the Plaistow Planning Board inquiring into the necessity of site plan approval over the project pursuant to NH RSA 674:43 and NH RSA 674:4. In 1987, the Planning Board allegedly ruled that no public hearing was required for site plan approval since the terminal was to be in Newton with access through a private drive in Plaistow. Plaistow argues that any decision made by the planning board was based on false representations by Olympiad regarding the nature and hours of operation of the terminal.

Olympiad proceeded to acquire the land and construct the terminal at a cost in excess of $1,000,000.00. Olympiad then leased the terminal to Atlas Motor Express, Inc. ("Atlas"), which began operations at the terminal in 1988. Atlas' ordinary business practices require that various interstate motor carriers traveling throughout the United States utilize its Newton, N.H. terminal. The terminal is located less than one mile from New Hampshire Route 125 and Interstate 495, each of which is part of the Federal Highway System.

On October 7, 1988, Plaistow served upon Atlas and Olympiad a notice to cease and desist its operations which were alleged to be in violation of Plaistow Zoning Ordinance § 1.4. In 1989, the Rockingham County Superior Court issued a permanent injunction against Atlas and Olympiad enforcing ordinance § 1.4 by limiting the hours of operation of the terminal to the following:

Effective until March 20, 1993:

(a) 4:45 a.m. to 6:00 a.m.-- five tractor trailer units may enter or leave;

(b) 6:00 a.m. to 9:00 p.m. — unrestricted;

(c) 9:00 p.m. to 11:00 — three tractor trailer units may enter or leave;

(d) 11:00 p.m. to 4:45 a.m. — no tractor trailer units may enter or leave.

Effective March 20, 1993:

(a) 5:00 a.m. to 6:00 a.m. — three tractor trailer units may enter of leave;

(b) 6:00 a.m. to 9:00 p.m. — unrestricted

(c) 9:00 p.m. to 11:00 p.m. two tractor trailer units may enter or leave;

(d) 11:00 p.m. to 5:00 a.m. no tractor trailer units may enter or leave.

Olympiad and Atlas have caused a gate to be erected to prevent ingress and egress at prohibited times in an attempt to regulate compliance with the permanent injunction. The plaintiffs allege that nighttime operations are essential to their operations and that they are at a disadvantaged position in relation to their competitors who operate without similar restrictions. On the other hand, neighbors have periodically complained, and Plaistow strongly believes it has a right to enforce a local zoning or nuisance ordinance to protect these

interests and that such an ordinance is not preempted by federal law.

Discussion

I. *Fed. R. Civ. P. 12(b)(6)*

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) is one of limited inquiry, focusing not on "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Accordingly, the court must take the factual averments contained in the complaint as true, "indulging every reasonable inference helpful to the plaintiff's cause." In *Garita Hotel Ltd. Partnership v. Ponce Federal Bank. F.S.B.*, 958 F.2d 15, 17 (lst Cir. 1992); *see also Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (lst Cir. 1989). In the end, the court may grant a motion to dismiss under Rule 12(b)(6) " 'only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.' " *Garita*, 958 F.2d at 17 (quoting *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (lst Cir. 1990)).

II. *Federal Preemption*

As early as 1824, the United States Supreme Court, under the rubric of the Supremacy Clause,[1] declared that state laws

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1. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

(Cont'd)

which "interfere with, or are contrary to, the laws of congress, made in pursuance of the constitution" are preempted and therefore invalid. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). The First Circuit has recently noted that "[t]his verity remains firmly embedded in our modern jurisprudence." *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 822 (1st Cir. 1992) (citing *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2481 (1991)), *cert. denied* 113 S. Ct. 974 (1993).

The Supreme Court has drawn a distinction between express and implied preemption. *Id.* "Express preemption occurs 'when Congress has "unmistakably . . . ordained" that its enactments alone are to regulate a [subject, and] state laws regulating that [subject] must fall.' " *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted)). When a court considers an issue of express preemption, "the only remaining question is whether a particular state statute intrudes into the federal pale." *Id.* (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988); *Cable Television Ass'n v. Finneran*, 954 F.2d 91, 98 (2d Cir. 1992)).

By contrast, "[i]mplied preemption comes in a wide variety of sizes and shapes. A court need not consider the various forms of implied preemption, however, when it is clear that the principles of express preemption apply. *See Ring v. Collagen Corp.*, 983 F.2d 1130 (1st Cir. 1993) (express

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(Cont'd)

> Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

preemption provisions foreclose inquiry into implied preemption), *cert. denied* 62 U.S.L.W. 3245 (1993). In any event, any preemption analysis begins with the question of whether Congress intended federal law to preempt state law. *Id.* To discern Congress' intent, we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 137-38 (1990) (quoting *Allis-Chalmers Cork. v. Lueck,* 471 U.S. 202, 208 (1985)) (internal citations omitted). Next, a preemption analysis must recognize that "the historic police powers of the States [are] not to be superseded by [a] federal act unless that was the clear and manifest purpose of Congress." *Id.* (citation omitted). Courts must also recognize that "the authority to displace a sovereign state's law is 'an extraordinary power . . . . that we must assume Congress does not exercise lightly.' " *Id.* (quoting *Gregory v. Ashcroft,* 111 S. Ct. 2395, 2400 (1991)). Uneven federal statutes that contain express preemption clauses must be viewed through the prism of this assumption *Id.* (citing *Cipollone v. Liggett Group. Inc.,* 112 S. Ct. 2608, 2615-19 (1992) (plurality opinion), 112 S. Ct. at 2625 (Blackmun, J., concurring in part and dissenting in part)). With that overview of preemption law, the Court will now directly address the issue of preemption of § 1.4 by the federal statutes set forth by NHMTA.

A. Preemption by the Surface Transportation Assistance Act

The Surface Transportation Assistance Act ("STAA") contains an express preemption provision in § 2312 which provides, in relevant part:

> (a) No State may enact or enforce any law denying reasonable access to commercial

> motor vehicles subject to this chapter between (1) the Interstate and Defense Highway System . . . and (2) terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading for household goods carriers, motor carrier of passengers, and for any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 and 1/2 feet and which generally operates as part of a vehicle combination described in section 2311(c) of this title.
>
> (b) Nothing in this section shall be construed as preventing any state or local government from imposing any reasonable restrictions based on safety considerations, on any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 38 and 1/2 feet and which operates as part of a vehicle combination described in section 2331(c) of this title.

49 U.S.C. § 2312 (a)&(b) (supp. 1993).

Plaistow Zoning Ordinance § 1.4 states that:

> Any use that may be obnoxious or injurious by reason of the production or emission of odors, dust, smoke, refuse matter, fumes, noises, vibration or other similar conditions, or that are dangerous to the

> comfort, peace, enjoyment, health or safety of the community whether it contributes to its disturbance or annoyance are prohibited in all districts.

Plaistow Zoning Ordinance, § 1.4.

On the face of these enactments, it is pellucidly clear that no direct conflict exists. The Plaistow ordinance, however, the town argues, is not of the type that Congress intended to preempt in enacting the STAA. Plaistow further argues that no preemption exists in this case because the town ordinance is not designed to regulate trucking activities, but rather acts as an "incidental denial of nighttime access." (*See Reply to Plaintiff's Objection to the Defendant's Motion to Dismiss*, at 3). Plaistow fails to recognize, however, that when deciding an express preemption case, the Court is charged with the duty to discover any conflict between the statutes, not as written on their face, but as interpreted and applied in that case. *Jones v. Rath Packing*, 430 U.S. 519, 526 (1977) (courts must consider the relationship between state and federal laws as interpreted and applied, not merely as written); *Great Western United Corn. v. Ridwell*, 577 F.2d 1256, 1274-75 (5th Cir. 1978) (preemption analysis to be done by considering the application of the state law to the circumstances of the particular case), *rev'd on other grounds* 443 U.S. 173 (1979); *New York State Motor Truck Ass'n v. New York*, 654 F. Supp. 1521, 1524-25 (S.D.N.Y.), *aff'd* 833 F.2d 430 (2nd Cir. 1987) (STAA preemption provisions preclude any "scheme of burdensome regulation that could only have the effect of achieving by an accumulation of petty irritations what Ha state cannot] achieve through outright prohibition") (quoting *United States v. Connecticut*, 566 F. Supp. 571, 577 n.7 (D.

Conn.), *aff'd* 742 F.2d 1443 (2d Cir. 1983), *aff'd* 465 U.S. 1014 (1984).

As explained, "[t]he proper analysis for questions of federal preemption is well settled. Where Congress has clearly expressed its intention to preempt conflicting state law, the only inquiry is whether the state law in question actually conflicts with federal law." *A.B.F. Freight System. Inc. v. Suthard,* 681 F.Supp. 334 (E.D. Va. 1988). "In the STAA, Congress expressly intended to preempt all inconsistent state regulation: "No State may enact or enforce any law denying reasonable access to commercial motor vehicles subject to this chapter. . .' " Consequently, the only question to be resolved with regard to this issue is whether Plaistow Zoning Ordinance § 1.4, "as interpreted and applied", conflicts with the provisions of the STAA. If the two enactments conflict, then the local ordinance is preempted. If no conflict exists, however, between the two enactments, then they may exist independently of each other without interference from this court.

The gravamen of this case is whether or not the Plaistow ordinance, as applied and interpreted, violates a simple but uncertain concept set forth in the STAA: "Reasonable Access". The Plaistow ordinance has been interpreted and applied by the superior court in such a way as to limit the nighttime operations of the Newton terminal. The question remains, however, whether or not "reasonable access" has been denied.

This Court interprets the STAA as follows: If a state or local municipality enacts a statute or ordinance which denies commercial motor vehicles subject to the Act "reasonable

access" to their terminals, then it is in violation of federal law. *See* 49 U.S.C. § 2312(a). A limited exception to this general rule exists in § 2312(b) which allows reasonable restrictions to be placed on "pup" commercial vehicles if the sole objective for the enactments is safety. *See A.B.F. Freight Systems Inc.*, 681 F. Supp. at 334 (discussing the limited exception to the "reasonable access" guarantee for "pups" based on safety concerns). The question of the purpose of the ordinance need not be met, however, if the general rule is complied with, that is, if "reasonable access" is maintained. This Court notes that based on the record, no showing of safety objectives have been made by Plaistow in enacting the ordinance. Therefore, assuming *arguendo* that "reasonable access" has been denied by applying the ordinance, the exception for "pup" trailers will not be met and the principles of federal preemption will apply.

It all comes down to that simple but uncertain concept: Is "reasonable access" being denied to NHMTA. The Court notes that the term "reasonable is a factual question which requires a consideration of the circumstances involved. The Court further notes that the pleadings are devoid of information surrounding the reasonableness of the nighttime restrictions considering the parties interests and industry standards. While the Court is mindful of the town's interests here, it is concerned about "the particular difficulty that long distance haulers would face trying to coordinate their delivery schedules to avoid the prohibited hours." *New York State Motor Truck Ass'n*, 654 F. Supp. at 1536.

Since there exists, at the very least, an arguable theory that the town of Plaistow went beyond its permissible police power and denied "reasonable access", the authority

surrounding rule 12(b)(6) requires that the plaintiff be allowed to present evidence to support its claims. *See Garita*, 958 F.2d at 17 (plaintiff entitled to offer evidence to support any viable theory); *New York State Motor Truck Ass'n* , 654 F. Supp. at 1534-35 (state regulation restricting hours of use of tandem trucks preempted by STAA); *United States v. Florida*, 585 F.Supp. 807 (N.D. Fla. 1984) (Florida's time of day restrictions held invalid under Supremacy Clause since in conflict with STAA); *cf. Pirolo v. Clearwater*, 711 F.2d 1006 (11th Cir. 1983) (municipal airport ordinance prohibiting night operations and prescribing air traffic patterns preempted by federal regulations and thus in violation of Supremacy Clause).

In the event that the commercial motor vehicles involved are shown to be covered by the STAA and a denial of "reasonable access" is established, this Court would then hold that Plaistow Zoning Ordinance § 1.4 violates § 2312(a) of the STAA and is therefore preempted and unenforceable as applied. On the other hand, if a denial of "reasonable access" is not established, the Court would hold that no violation exists and the local ordinance would therefore continue to be enforced against NHMTA. Accordingly, Plaistow's Motion to Dismiss as to Count I must be denied so that this issue of possible preemption may be resolved.

B. Preemption by the Hazardous Materials Transportation Uniform Safety Act

The Hazardous Material Transportation Uniform Safety Act ("HMTUA") contains an express preemption provision in § 1811 which provides in pertinent part that:

Appendix E

> Except as provided in subsection (d) . . . an requirement of a State or political subdivision thereof or Indian tribe is preempted if — (1) compliance with both the State or political subdivision or Indian tribe requirement and an requirement of this title or of a regulation issued under this title is not possible, [or] (2) the State or political subdivision or Indian tribe requirement as applied or enforced creates an obstacle to the accomplishment and execution of this title or the regulations issued under this title . . .

49 U.S.C. § 1811(a)(1)(2) (supp. 1993)

The HMTUA further provides that "[t]he Secretary [of Transportation] shall issue regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce. . . . The regulation issued under this section shall govern any aspect of hazardous material transportation safety which the Secretary deems necessary or appropriate." 49 U.S.C. § 1804(a)(1). Pursuant to this authorization, the Secretary issued 49 C.F.R. § 177 entitled "Carriage by public highway". The purpose of these regulations is to "prescribe requirements . . . that are applicable to the acceptance and transportation of hazardous materials by private, common or contract carriers by motor vehicle." 49 C.F.R. § 177.800(a). Under § 177.853(a) entitled "transportation and delivery of shipments", there may be "undo unnecessary delay in movement of shipments. . . . All shipments of hazardous material shall be transported without unnecessary delay, from and including the time of

commencement of the loading of the cargo until its final discharge at destination." 49 C.F.R. § 177.853(a).

Although, as Plaistow argues, the clear language of this regulation appears to be aimed at the carrier and not the state or town, the language of § 1811(b) of the HMTUA makes it clear that a state or town may not pass an ordinance which "as applied or in force create[s] an obstacle to the accomplishment of . . . the regulations issued under this chapter". 49 U.S.C. § 1811(a)(2). Since the application of Plaistow Zoning Ordinance § 1.4, as applied and in force, may be creating an obstacle by causing unnecessary delayer to the transportation of hazardous materials, the possibility exists that a violation of 49 U.S.C. § 1811(a) and 49 C.F.R. § 177.853 has occurred, which as explained under the STAA preemption analysis (*supra*), would result in federal preemption by the HMTUA. *See National Tank Truck Carriers. Inc. v. Burke,* 535 F.Supp. 509 (D.R.I. 1982), *aff'd* 698 F.2d 559 (lst Cir. 1983) (state regulations which prohibit transportation of hazardous substances during rush hours could cause unnecessary delays in conflict with one purpose of HMTUA and are therefore preempted); *Union P. R. Co. v. Las Vegas,* 747 F. Supp. 1402 (D. Nev. 1989) (city ordinance relating to transportation of hazardous materials preempted by HMTUA since effect of ordinance is to impermissibly delay or virtually stop delivery).

Plaistow argues that preemption is inapplicable because a local zoning or nuisance ordinance is involved as opposed to a regulatory scheme aimed specifically at hazardous waste transportation. The express language of the HMTUA itself, however, states that any requirement of a local town is preempted if it interferes with the Act as applied and enforced.

See 49 U.S.C. 1811(a). Although Plaistow claims otherwise, there is authority standing for the proposition that local nuisance or zoning ordinances not directly related to the regulation of hazardous materials may nonetheless be preempted by HMTUA if it violates it as applied. In *Consolidated Rail Corp. v. Dover,* 450 F. Supp. 966 (D. Del. 1978), the city of Dover, Delaware argued that the transporting of hazardous materials constituted a common law public nuisance violating, "the comfort, repose, health, peace and safety" of the residents. *Id.* at 972 n.8. Holding that another federal statute preempted this claim as applied, the court stated "[w]hat Dover may not do directly through enforcement of tan] ordinance, it may not do indirectly by means of a common law nuisance claim." *Id.* at 972. Similarly, this Court believes that what Plaistow cannot do by directly passing hazardous waste regulations, it cannot do by indirectly passing a nuisance ordinance. As the court in *Consolidated Rail* stated "it would be incongruous for the court to hold otherwise". *Id.*

The *Consolidated Rail* court went on to consider whether a town's common law public nuisance cause of action constituted a "requirement" under § 1811(a) of the HMTUA. *Id.* at 973-74. Although the court disposed of the HMTUA preemption issue on other grounds, its consideration of a nuisance cause of action as a possible "requirement" of a town under the HMTUA strongly implies that a nuisance ordinance would clearly be a "requirement" of a town. *Id.* This Court is convinced that, in light of these authorities looking not at the face of the enactments but whether a conflict exists as applied, a possibility of preemption under the HMTUA exists in the instant case.

Consequently, since a viable theory exist as to preemption by the HMTUA, NHMTA will be allowed to offer proof, specifically that the transportation of waste covered by the HMTUA is involved and that "unnecessary delayer has resulted through the enforcement of the local ordinances. If these facts are established, a violation of the § 1811(a) will be established and, accordingly, the local ordinance will be preempted. Plaistow's motion to dismiss count II is therefore denied.

C. Preemption by the Noise Control Act

The Noise Control Act ("NCA") contains an express preemption provisions in § 4917(c) which provides in pertinent part as follows:

> (1) [N]o State or political subdivision thereof may adopt or enforce any standard applicable to the same operation of such motor carrier, unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.
>
> (2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the ... Secretary of Transportation

> determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

42 U.S.C. § 4917(c)(1)&(2) (1989).

Although the above quoted provisions evidence an express preemption clause, it is interpreted, based on the plain reading of the NCA, as well as the legislative history thereof, very narrowly. *See Baltimore & O. R. Co. v. Oberly,* 837 F.2d 108 (3rd. Cir. 1988). In considering the above preemption language, this Court would be remiss if it didn't also consider § 4901(a)(3) entitled "congressional findings and statement of policies" which states that "primary responsibility for control of noise rests with State and local governments. . . ." 42 U.S.C. § 4901(a)(3).

In an apposite Third Circuit case, *Baltimore and O. R. Co. v. Oberly,* 837 F.2d 108 (3rd Cir. 1988), the court considered whether a Delaware noise control statute as applied to a railroad company was preempted by the NCA. The court ultimately declined to find preemption holding that the NCA is to be interpreted narrowly and that states and local municipalities are to be given deference in passing noise related regulations. *Id.* at 114-15. In doing so, the court illustrated its point by stating that "[w]e believe that the plain language of the preemption section justifies a narrow interpretation of its effects . . . [the preemption section] concerns preemption in the context of *specific* federal noise regulations . . . [it] is not a global preemption provision . . . . it in no way suggests that Congress meant for the adoption of

any federal noise regulation to bar or displace every state effort to regulate the noise emission of interstate . . . carriers." *Id.* at 113-14.

While these statements went to the preemption provision from § 4916 regarding railroad noise emissions, the Court deems the same analysis apposite to the instant situation considering that the language of § 4916 is practically identical to that of § 4917 regarding motor carrier noise emissions. In light of the express policy statement of Congress in § 4901 to give great latitude to the states and local municipalities in this area and the fact that no violation on the face of the NCA occurs through the application of the local ordnance, this court believes that congressional intent requires it to exclude the possibility of federal preemption.

The fundamental difference between possible preemption by the STAA and the HMTUA and a lack of preemption by the NCA is congressional intent. It is evident to this court, based on a plain reading of the respective statutes, case law, and legislative histories, that under the STAA and HMTUA an application of the local ordinance may constitute a violation of federal law on the face of the statutes in interest. Therefore, in those two cases, the express preemption provisions enacted by Congress must control and federal preemption may apply. This is the case because Congress intended that these federal statutes be fully complied with by State and local governments. Under the NCA, however, no facial violation of the statutory language exists and in addition, Congress clearly enunciates a greater latitude to be afforded states and local municipalities in the area of noise regulation. Therefore, under the NCA's narrowly interpreted preemption clause, as opposed to the broadly interpreted preemption clauses in the

STAA and HMTUA, the strong police power of the state controls and Plaistow's local ordinance will not be invalidated, at least as a result of the NCA.

Consequently, since this Court finds, even in the light most favorable to NHMTA, that the NCA does not preempt Plaistow Zoning Ordinance § 1.4 and that no violation of the NCA exists as the ordinance is applied, Count III of NHMTA's complaint is hereby dismissed.

III. *The Commerce Clause*

As explained above, where a State or municipality regulates interstate commerce in a way inconsistent with Congress, the state or municipal regulation is preempted. Where no such conflict exists, however, nothing in the Commerce Clause[2] explicitly prohibits the State or municipality from permissibly regulating interstate commerce. *See Hyde Park Partners, L.P. v. Connolly,* 839 F.2d 837, 843 (lst Cir. 1988) (discussing state regulations and the Commerce Clause). "Nevertheless, the Supreme Court has established the 'dormant Commerce Clause,' under which the states are barred from regulating interstate commerce in a manner which significantly interferes with the national economy. *Id.* In doing so, the Supreme Court has distinguished between two effects state or local regulations have on interstate commerce, applying a different standard to each: (1) an incidental burden, and (2) an affirmative discrimination. *See Maine v. Taylor,* 477 U.S. 131, 138 (1986) (setting forth

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2. The Commerce Clause of the United States Constitution provides that "Congress shall have the power to regulate commerce with Foreign nations and among the several states." U.S. Const., ART 1, § 8 cl. 3.

the test to apply in determining whether a state has overstepped its role in regulating interstate commerce).

Where an incidental burden on interstate commerce exists, the regulation will be upheld unless:

> the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church. Inc, 397 U.S. 137, 142 (1970).

On the other hand, where a more affirmative discrimination exists effectuating economic protectionism, a stricter scrutiny is applied constituting a "virtual per se" rule of unconstitutionality. *See South-Central Timber Development. Inc. v. Wunnicke,* 467 U.S. 82 (1984) (discussing standard to apply where regulation has affirmative discriminatory effect on commerce). In such a case, the burden is on the State to demonstrate that the statute serves a legitimate local purpose and that no less discriminatory means exist. *See Davrod Corp. v. Coates,* 971 F.2d 778 (lst Cir. 1992).

Considering the strong police power of the states coupled with the fact that Plaistow Zoning Ordinance §1.4 is not discriminating against out of state commercial vehicles only,

but applies to all commercial vehicles, the Court finds that no affirmative discrimination exists here. Rather, the Court finds that any effect the local ordinance has on interstate commerce is merely incidental. *See Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1234 (D.Del. 1986) (regulations which govern evenhandedly and not discriminatory to out of state interests subject to incidental burden test).

It follows, therefore, that the test to apply is that set forth by the Supreme Court in *Pike*. Consequently, NHMTA will be allowed to prove that "the burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. If NHMTA can make such a showing, the Court will hold that the Commerce Clause has been violated. Plaistow's motion to dismiss Count IV of NHMTA's complaint must therefore be denied to allow NHMTA the opportunity to make the required showing.

IV. *The Supremacy Clause*

In Count V, NHMTA simply sets forth its claim for preemption as a result of the alleged violations of federal law. Consistent with the above rulings, Plaistow's motion to dismiss Count V is denied to the extent that Count V alleges preemption for violation of the STAA, HMTUA and the Commerce Clause. Plaistow's motion to dismiss Count V is granted only to the extent that Count V alleges a violation of the NCA.

V. *Conclusion*

For the reasons set forth above, Plaistow's motion to dismiss Counts I, II, IV and V (to the extent it alleges a

violation of the STAA, HMTUA, and Commerce Clause) is hereby denied. Plaistow's motion to dismiss Counts III and V (to the extent it alleges a violation of the NCA) is hereby granted.

So ordered.

October 25, 1993

s/ Martin F. Loughlin
Martin F. Loughlin
Senior Judge

William Barron, Esq.
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APPENDIX F — RELEVANT STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS

49 U.S.C. § 1811

§ 1811. Relationship to other laws

(a) In general. Except as provided in subsection (d) and unless otherwise authorized by Federal law, a requirement of a State or political subdivision thereof or Indian tribe is preempted if —

(1) compliance with both the State or political subdivision or Indian tribe requirement and a requirement of this title or of a regulation issued under this title is not possible,

(2) the State or political subdivision or Indian tribe requirement as applied or enforced creates an obstacle to the accomplishment and execution of this title or the regulations issued under this title, or

(3) It is preempted under section 105(a)(4) or section 105(b) [49 USCS Appx. § 1804(a)(4) or (b)].

49 U.S.C. § 2312

§ 2312. Access to the Interstate System

(a) No State may enact or enforce any law denying reasonable access to commercial motor vehicles subject to this title between (1) the Interstate and Defense Highway System (other than any segment thereof which is exempted under section 411(i) or 416(e) of this title [49 USCS Appx. 32311(i) or 2315(e)]) and any other qualifying Federal-aid Primary

System highways, as designated by the Secretary, and (2) terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading for household goods carriers and for any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 1/2 feet and which generally operates as part of a vehicle combination described in section 411(c) of this Act [49 USCS Appx. § 2311(c)].

(b) Nothing in this section shall be construed as preventing any State or local government from imposing any reasonable restriction, based on safety considerations, on any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 1/2 feet and which generally operates as part of a vehicle combination described in section 411(c) of this Act [49 USCS Appx. § 2311(c)].

42 U.S.C. § 4901

§ 4901. Congressional findings and statement of policy

(a) The Congress finds —

(1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;

(2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and

(3) that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in

commerce control of which require national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this chapter to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

42 U.S.C. § 4917

§ 4917. Motor carrier noise emission standards

(a) Regulations; standards; consultation with Secretary of Transportation

(1) Within nine months after October 27, 1972, the Administrator shall publish proposed noise emission regulations for motor carriers engaged in interstate commerce. Such proposed regulations shall include noise emission standards setting such limits on noise emissions resulting from operation of motor carriers engaged in interstate commerce which reflect the degree of noise reduction achievable through the application of the best available technology, taking into account the cost of compliance. These regulations shall be in addition to any regulations that may be proposed under section 4905 of this title.

(2) Within ninety days after the publication of such

regulations as may be proposed under paragraph (1) of this subsection, and subject to the provisions of section 4915 of this title, the Administrator shall promulgate final regulations. Such regulations may be revised from time to time, in accordance with this subsection.

(3) Any standard or regulation, or revision thereof, proposed under this subsection shall be promulgated only after consultation with the Secretary of Transportation in order to assure appropriate consideration for safety and technological availability.

(4) Any regulation or revision thereof promulgated under this subsection shall take effect after such period as the Administrator finds necessary, after consultation with the Secretary of Transportation, to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(b) Regulations to insure compliance with noise emission standards

The Secretary of Transportation, after consultation with the Administrator shall promulgate regulations to insure compliance with all standards promulgated by the Administrator under this section. The Secretary of Transportation shall carry out such regulations through the use of his powers and duties of enforcement and inspection authorized by subtitle IV of Title 49 and the Department of Transportation Act [49 U.S.C.A. § 1651 et seq.]. Regulations promulgated under this section shall be subject to the provisions of sections 4909, 4910, 4911, and 4915 of this title.

Appendix F

(c) State and local standards and controls

(1) Subject to paragraph (2) of this subsection but notwithstanding any other provision of this chapter, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any motor carrier engaged in interstate commerce, no State or political subdivision thereof may adopt or enforce any standard applicable to the same operation of such motor carrier, unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

49 U.S.C. § 5103

§ 5103. General regulatory authority

(b) Regulations for safe transportation. — (1) The Secretary shall prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce. The regulations —

(A) apply to a person —

(i) transporting hazardous material in commerce;

(ii) causing hazardous material to be transported in commerce; or

(iii) manufacturing, fabricating, marking, maintaining, reconditioning, repairing, or testing a package or container that is represented, marked, certified, or sold by that person as qualified for use in transporting hazardous material in commerce; and

(B) shall govern safety aspects of the transportation of hazardous material the Secretary considers appropriate.

(2) A proceeding to prescribe the regulations must include an opportunity for informal oral presentations.

49 U.S.C. § 5125

§ 5125. Preemption

(a) General. — Except as provided in subsections (b), (c), and (e) of this section, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if —

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

49 U.S.C. § 31114

§ 31114. Access to the Interstate System

(a) Prohibition on denying access. — A State may not enact or enforce a law denying to a commercial motor vehicle subject to this subchapter or subchapter I of this chapter reasonable access between —

(1) the Dwight D. Eisenhower System of Interstate and Defense Highways (except a segment exempted under section 31111(f) or 31113(e) of this title) and other qualifying Federal-aid Primary System highways designated by the Secretary of Transportation; and

(2) terminals, facilities for food, fuel, repairs, and rest, and points of loading and unloading for household goods carriers, motor carriers of passengers, or any truck tractor-semitrailer combination in which the semitrailer has a length of not more than 28.5 feet and that generally operates as part of a vehicle combination described in section 31111(c) of this title.

(b) Exception. — This section does not prevent a State or local government from imposing reasonable restrictions, based on safety considerations, on a truck tractor-semitrailer combination in which the semitrailer has a length of not more than 28.5 feet and that generally operates as part of a vehicle combination described in section 31111(c) of this title.

Appendix F

New Hampshire R.S.A. 265:108

II. Access routes for truck-tractor, semi-trailer or full trailer combinations to and from the interstate system and state turnpike system from and to terminal facility sites may be granted by permit upon application in writing to the commissioner of the department of transportation by the terminal facility operator or owner. Access to points of loading and unloading for household goods carriers may be granted on an individual basis by application to the department of transportation. Said approval, based on reasonably safe highways and driving conditions, may be granted for class I and class II highways, and with concurrence of local officials, for class IV and class V highways.

23 C.F.R. § 658.19

§ 658.19 Reasonable access.

(a) No State may enact or enforce any law denying reasonable access to vehicles with dimensions authorized by the STAA between the National Network and terminals and facilities for food, fuel, repairs, and rest. In addition, no State may enact or enforce any law denying reasonable access between the National Network and points of loading and unloading to household goods carriers and any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 feet (28 1/2 feet where allowed pursuant to § 658.13(b)(5)) and which generally operates as part of a vehicle combination described in §§ 658.13(b)(5) and 658.15(a).

(b) All States shall make available to commercial motor

vehicle operators information regarding their reasonable access provisions to and from the National Network.

(c) Nothing in this section shall be construed as preventing any State or local government from imposing any reasonable restriction, based on safety considerations, on access to points of loading and unloading by any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 1/2 feet and which generally operates as part of a vehicle combination described in §§ 658.13(b)(5) and 658.15(a).

(d) No State may enact or enforce any law denying access within 1 road-mile from the National Network using the most reasonable and practicable route available except for specific safety reasons on individual routes.

(e) Approval of access for specific vehicles on any individual route applies to all vehicles of the same type regardless of ownership. Distinctions between vehicle types shall be based only on significant, substantial differences in their operating characteristics.

(f) Blanket restriction on 102-inch wide vehicles may not be imposed.

(g) Vehicle dimension limits shall not be more restrictive than Federal requirements.

(h) States shall ensure compliance with the requirements of this section for roads under the jurisdiction of local units of government.

Appendix F

(i)(1) Except in those States in which State law authorizes the operation of STAA-dimensioned vehicles on all public roads and highways, all States shall have an access process that provides for the review of requests for access from the National Network.

(2) State access review processes shall provide for:

(1) One or more of the following:

(A) An analysis of the proposed access routes using observations or other data obtained from the operation of test vehicles over the routes;

(B) An analysis of the proposed access routes by application of vehicle templates to plans of the routes;

(C) A general provision for allowing access, without requiring a request, for commercial motor vehicles with semi-trailers with a kingpin distance of 41 feet or less (measured from the kingpin to the center of the rear axle, if single, or the center of a group of rear axles). State safety analyses may be conducted on individual routes if warranted; and

(ii) All of the following:

(A) The denial of access to terminals and services only on the basis of safety and engineering analysis of the access route.

(B) The automatic approval of an access request if not acted upon within 90 days of receipt by the State. This

provision shall become effective no later than 12 months following the effective date of this rule unless an extension is requested by the State and approved by FHWA.

(C) The denial of access for any 102-inch wide vehicles only on the basis of the characteristics of specific routes, in particular significant deficiencies in lane width.

40 C.F.R. § 202.20

§ 202.20 Standards for highway operations.

(a) No motor carrier subject to these regulations shall operate any motor vehicle of a type to which this regulation is applicable which at any time or under any condition of highway trade, load, acceleration or deceleration generates a sound level in excess of 86dB(A) measured on an open site with fast meter response at 50 feet from the centerline of lane of travel on highways with speed limits of 35 MPH or less; or 90 dB(A) measured on an open site with fast meter response at 50 feet from the centerline of lane of travel on highways with speed limits of more than 35 MPH.

(b) No motor carrier subject to these regulations shall operate any motor vehicle of a type to which this regulation is applicable which at any time or under any condition of highway grade, load, acceleration or deceleration generates a sound level in excess of 83 dB(A) measured on an open site with fast meter response at 50 feet from the centerline of lane of travel on highways with speed limits of 35 MPH or less; or 87 dB(A) measured on an open site with fast meter response at 50 feet from the centerline of lane of travel on highways with speed limits of more than 35 MPH.

Appendix F

40 C.F.R. § 202.21

§ 202.21 Standard for operation under stationary test.

(a) No motor carrier subject to these regulations shall operate any motor vehicle of a type to which this regulation is applicable which generates a sound level in excess of 88 dB(A) measured on an open site with fast meter response at 50 feet from the longitudinal centerline of the vehicle, when its engine is accelerated from idle with wide open throttle to governed speed with the vehicle stationary, transmission in neutral, and clutch engaged. This section shall not apply to any vehicle which is not equipped with an engine speed governor.

(b) No motor carrier subject to these regulations shall operate any motor vehicle of a type to which this regulation is applicable which generates a sound level in excess of 85 dB(A) measured on an open site with fast meter response at 50 feet from the longitudinal centerline of the vehicle when its engine is accelerated from idle with wide open throttle to governed speed with the vehicle stationary, transmission in neutral, and clutch engaged. This paragraph shall not apply to any vehicle which is not equipped with an engine speed governor.

49 C.F.R. § 177.853

§ 177.853 Transportation and delivery of shipments.

(a) *No unnecessary delay in movement of shipments.* All shipments of hazardous materials shall be transported without unnecessary delay, from and including the time of commencement of the loading of the cargo until its final discharge at destination.

Appendix F

United States Constitution, Article 1, § 8

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

95-1186

Supreme Court, U.S.
FILED
FEB 26 1996
CLERK

No. 95-1156

In The
Supreme Court of the United States

October Term, 1995

NEW HAMPSHIRE MOTOR TRANSPORT, *et al.*,

Petitioners,

vs.

TOWN OF PLAISTOW,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Surface Transportation Assistance Act does not preempt the Town of Plaistow from enforcing a zoning ordinance in a manner which retains reasonable access to a trucking facility, and that because the Town maintained reasonable access, it is unnecessary to determine whether access was restricted for safety reasons.

2. Whether the court of appeals correctly held that the Town of Plaistow can enforce a zoning ordinance so as to limit nighttime access to a trucking facility, and that the enforcement is not preempted by the Hazardous Materials Transportation Uniform Safety Act because it does not cause unnecessary delay in the movement of hazardous materials.

3. Whether the court of appeals correctly held that the Town of Plaistow can enforce a zoning ordinance so as to limit nighttime access to a trucking facility, and that the enforcement does not unduly burden interstate commerce.

4. Whether the court of appeals correctly held that the Town of Plaistow can enforce a zoning ordinance so as to limit nighttime access to a trucking facility, and that the enforcement is not preempted by the Noise Control Act because primary responsibility for control of noise rests with state and local governments.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

STATEMENT OF THE CASE 3

I. Statement of Facts 3

II. Course of Proceedings and Opinions Below 8

ARGUMENT 10

I. The Surface Transportation Assistance Act . . . 12

A. The Decision Below Does Not Create A Conflict Among the Circuits. 12

B. The Decision Below Does Not Conflict With Decisions of Other District Courts 13

C. Even If The Decision Below Conflicts With Decisions of District Courts, Review By This Court Is Not Warranted 16

D. The Court of Appeals Correctly Determined that the STAA Does Not Preempt the Town From Imposing Reasonable Late-Night Restrictions on Truck Traffic Through A Residential Area 18

II. The Hazardous Materials Transportation Uniform Safety Act 21

A. The Decision Below Does Not Raise Any Issues Which Warrant Review 21

B. The Court of Appeals Correctly Determined that the HMTUSA Does Not Preempt the Town's Restrictions 22

III. The Noise Control Act 23

A. The Decision Below Does Not Raise Any Issues Which Warrant Review 23

B. The Court of Appeals Correctly Determined that the NCA Does Not Preempt the Town's Restrictions 24

V. The Commerce Clause 25

A. The Decision Below Does Not Raise Any Issues Which Warrant Review 25

B. The Court of Appeals Correctly Determined that the Commerce Clause Does Not Preempt the Town's Restrictions 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases cited:

ABF Freight System, Inc. v. Suthard, 681 F. Supp. 334 (E.D. Va. 1988) 15

Baltimore and Ohio R.R. Co. v. Oberly, 837 F.2d 108 (3d Cir. 1988) 23, 24, 25

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Maine v. Taylor, 477 U.S. 131 (1986) 26

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Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) . . . 26

Raymond Motor Transport. Inc. v. Rice, 434 U.S. 429 (1978) 26

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Statutes cited:

42 U.S.C. § 4901(a)(3) 2, 24

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49 U.S.C. § 31114(b) 13

United States Constitution cited:

United States Constitution, Art. 1, Sec. 8, cl. 3 8

Rules cited:

Supreme Court Rule 10.1 10

Other Authorities cited:

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23 C.F.R. § 658.19(i)(2) 2

40 C.F.R. § 202.20 . . . . . 2, 24

49 C.F.R. § 177.853(a) 22

Plaistow Ordinance Article 1, § 1.4 . . . . . 5, 8, 19

Robert L. Stern, et al., Supreme Court Practice 178-79 (7th ed. 1993) 16, 17, 22, 27

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Pursuant to its duty under the Supreme Court rules, the Respondent hereby sets forth those Constitutional provisions, statutes and regulations which were incorrectly or incompletely set forth in the Petition. Italics indicate language erroneously cited in or omitted from the Petition.

1. Regulations set forth in 23 C.F.R. § 658.19 provide, in part:

> (a) No State may enact or enforce any law denying reasonable access to vehicles with dimensions authorized by the STAA between the National Network and terminals and facilities for food, fuel, repairs, and rest. In addition, no State may enact or enforce any law denying reasonable access between the National Network and points of loading and unloading to household goods carriers, *motor carriers of passengers*, and any truck tractor-semitrailer combination in which the semitrailer has a length not to exceed 28 feet (28 ½ feet where allowed pursuant to § 658.13(b)(5)) and which generally operates as part of a vehicle combination described in §§ 658.13(b)(5) and 658.15(a).
>
> (b) All States shall make available to commercial motor vehicle operators *information regarding their reasonable* access provisions to and from the National Network.

2. The regulation identified in the Petition as 23 C.F.R. § 658.19(d)(1) should have been identified as (i)(1). The regulation identified in the Petition as (d)(2) should have been identified as (i)(2).

3. The United States Environmental Protection Agency's standards for noise emission enacted pursuant to the Noise Control Act and set forth in 40 C.F.R. § 202.20 provide, in part, as follows:

> (b) No motor carriers subject to these obligations shall operate any motor vehicle of a type to which this regulation is applicable which at any time or under any condition of highway grade, load, acceleration or deceleration generates a sound level in excess of 83 dB(A) measured on an open site with a fast meter response at 50 feet from the center line of lane of travel on highways with speed limits of more than 35 MPH *or less;*....

4. In addition, the Respondent relies on the following provision, which was not included in the Petition.

The Noise Control Act, 42 U.S.C. § 4901(a)(3), provides that:

> [The Congress finds] that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources

in commerce, control of which require national uniformity of treatment.

STATEMENT OF THE CASE

I. Statement of Facts.

In 1987, Atlas Motor Express, Inc. ("Atlas") began planning to relocate its trucking terminal from one location in Plaistow, New Hampshire, to another nearby site. Opinion of the district court ("district court"), Petition at 25a. In furtherance of this goal, Arnold Pevna, the trustee of Olympiad Realty Trust ("Olympiad"), entered into an agreement to purchase a parcel of land located partly in Plaistow and partly in Newton, New Hampshire. *Id.* Atlas intended to operate its trucking terminal on the portion of the property located in Newton. *Id.* Garland Way, a private road through a residential area of Plaistow, provided the only access to the proposed site. District court, Petition at 47a; Decision of the court of appeals ("court of appeals"), Petition at 8a. Garland Way can be accessed only via Kingston Road, a public road. *Id.*

Olympiad asked officials of the Town of Plaistow ("Town") about obtaining necessary approvals for the project. The Town did not have the authority to conduct a site plan review because Olympiad intended to build entirely in Newton. District court, Petition at 47a.

When the owners of abutting property in Plaistow learned of the proposed terminal, they were vehemently opposed to its construction. On November 16, 1987, some of the owners specifically requested that Plaistow and Newton take steps to stop the project.

Newton's planning board held hearings prior to the start of construction. Some of the Town's residents attended a meeting of the Newton planning board and spoke in opposition to the project. The residents expressed concerns about traffic, safety and noise from possible late night operations. Exhibit volume filed with the court of appeals ("exhibit volume") at E23-24. In addition, during the course of Newton's approval process, Mr. Pevna and his attorney, William Barron, made specific representations about the nature of Atlas' intended operations. Those representations included the following: only 17 or 18 trucks would use the terminal; the trucks would leave in the morning and return in the evening to remain overnight at the terminal; the last truck would arrive between 7:00 p.m. and 9:00 p.m.; the operation would not affect the residents and noise would not be a factor. Exhibit volume at E16, E18. The Newton planning board subsequently approved the project.

After the approval, a number of residents who owned property along the portion of Kingston Road south of Garland Way filed an action against Atlas in the New Hampshire Superior Court (Rockingham County). District court, Petition at 26a. The action was eventually settled. *Id.* at 27a. The settlement included an agreement that trucks leaving the terminal via Garland Way would only turn right, not left, onto Kingston Road. While the settlement appeased residents owning property to the south of Garland Way, the settlement necessarily meant that all trucks would be forced to pass by the unfortunate residents owning property along Kingston Road to the north of Garland Way. Moreover, the settlement had no effect on the hours trucks would be entering and exiting the terminal. Exhibit volume at E38.

On September 25, 1988, Atlas commenced operations. Most trucks approaching the terminal exited Interstate 495 in Haverhill, Massachusetts and traveled approximately six (6) miles, primarily on Route 125, a state highway, before reaching Garland Way. Garland Way begins 2,000 feet from the entrance to the terminal. Court of appeals, Petition at 8a. The Haverhill entrance to Route 495 is the closest point of access from the terminal to the Eisenhower System/National Network of Highways. *Id.* Route 125 is not, and has never been, part of the National Network. *Id.*

When the terminal opened in 1988, Atlas did not haul materials defined as hazardous under the Hazardous Materials Transportation Uniform Safety Act ("HMTUSA"). Exhibit volume at E20. In 1992, Atlas received a Hazardous Materials Permit. *Id.* at E82-83. Since that time, no more than half of the trailers entering the Atlas facility have contained hazardous materials. Most of those hazardous materials have been paint thinners and solvents. District court, Petition at 37a.

Due to the ongoing concern of the residents along Garland Way and Kingston Road, the Town served Atlas and Olympiad with a cease and desist order on October 7, 1988, shortly after the terminal opened. The order stated that Atlas was operating in violation of Plaistow Ordinance Article 1, § 1.4. That section provides as follows:

> Any uses that may be obnoxious or injurious by reason of the production or emission of odors, dust, smoke, refuse matter, fumes, noises, vibrations or other similar conditions,

> or that are dangerous to the comfort, piece, enjoyment, health or safety of the community whether it contributes to its disturbance or annoyance are prohibited in all Districts.

District court, Petition at 27a-28a. Atlas' operations violated the ordinance because the trucks entering and exiting the terminal were emitting odors, smoke, fumes, noise and vibration 24 hours each day. Atlas, however, ignored the Town's order and continued operations.

Faced with continuous complaints from residents and Atlas' deliberate choice to ignore the cease and desist order, the Town filed a petition for temporary and permanent injunctive relief in the superior court. *Id.* at 27a-28a. That petition did not take issue with Atlas' daytime operations or the number of trucks traveling on Kingston Road. Rather, it focused on the acceleration and deceleration of the trucks as they entered and exited Garland Way. In particular, the petition complained that a large number of trucks entered and exited the terminal between 7:00 p.m. and 10:00 p.m. Exhibit volume at E40-E44. For example, on one particular day, an owner of abutting residential property counted twenty-two trucks entering or exiting the terminal between those hours. *Id.*

On February 28, 1989, the superior court issued an order finding that the truck traffic on Garland Way unreasonably interfered with the sleep and lives of the residents. The court enjoined Atlas from allowing trucks to enter and exit the facility between 7:30 p.m. and 6:30 a.m. District court, Petition at 28a.

Atlas and other interstate carriers disregarded the order. Trucks continued to enter and exit the terminal 24 hours a day. The Town was forced to request injunctive relief a second time. Subsequently, the superior court issued a second order regarding the use of the terminal:

6:00 a.m. - 9:00 p.m. (15 hours) - unlimited access
9:00 p.m. - 11:00 p.m. (2 hours) - 2 trucks enter/exit
11:00 p.m. - 5:00 a.m. (6 hours) - no trucks enter/exit
5:00 a.m. - 6:00 a.m. (1 hour) - 3 trucks enter/exit.

Exhibit volume at E48-E69.

Atlas also ignored the second order. The Town eventually filed a motion for contempt. Simultaneously admitting non-compliance with the second order, Atlas requested a modification of its terms.

After a hearing, the superior court modified its second order and temporarily eased the restrictions. From March 20, 1992 through March 20, 1993, the modified order set the following parameters:

6:00 a.m. - 9:00 p.m. (15 hours) - unlimited access
9:00 p.m. - 11:00 p.m. (2 hours) - 3 trucks enter/exit
11:00 p.m. - 4:45 a.m. (5 3/4 hours) - no trucks enter/exit
4:45 a.m. - 6:00 a.m. (1 1/4 hours) - 5 trucks enter/exit.

Exhibit volume at E70-E71, E75-E76. The superior court clearly stated that it would make no further modifications and that further violations would result in sanctions for contempt against Atlas. *Id.*

II. Course of Proceedings and Opinions Below.

Petitioners filed this action in the United States District Court for the District of New Hampshire on March 6, 1993, just before the modified order was to revert to its earlier form. The complaint sought to bar the Town from enforcing § 1.4 of its zoning ordinance. Petitioners claimed that the enforcement of the ordinance was preempted by the Surface Transportation Assistance Act, the Hazardous Materials Transportation Uniform Safety Act, the Noise Control Act, and Art. 1, Sec. 8, cl. 3 of the United States Constitution, the Commerce Clause. Petition at 9.

The Town moved to dismiss the action on the basis that the federal statutes and regulations did not preempt the ordinance and that, as enforced, the ordinance did not violate the commerce clause. The court granted the motion to dismiss as to Count III, the claim under the Noise Control Act ("NCA"). *New Hampshire Motor Transport Ass'n v. Town of Plaistow*, 836 F. Supp. 59 (D.N.H. 1993), Petition at 60a-63a.

The court denied the remainder of the motion to dismiss. The court first considered the claim under the Surface Transportation Assistance Act ("STAA"). It stated that a municipality may enforce a local ordinance regulating commercial motor vehicles, including tractor trailers, as long as the enforcement of the ordinance allows "reasonable access" to terminals. If reasonable access is denied, the denial must be based on safety. *Id.* at 51a-56a. The court also held that the enforcement of the ordinance would only be preempted by the HMTUSA if it involved an "unnecessary delay" in the transportation of hazardous

waste. *Id.* at 56a-60a. The court reserved for trial the factual analysis necessary to determine whether the STAA or the HMTUSA preempted enforcement of the ordinance.

The court further held that since the restrictions did not affirmatively discriminate against interstate commerce, the commerce clause would only preempt their enforcement if the burden imposed on interstate commerce was shown to be clearly excessive in relation to the local benefits. The petitioners were given the opportunity at trial to show that the burden on interstate commerce was clearly excessive in relation to the local benefits. *Id.* at 63a-65a.

After a three day bench trial, the court issued an order finding that the Town was not prohibited from enforcing the order in the manner described. *New Hampshire Motor Transport Ass'n v. Town of Plaistow,* 881 F. Supp. 695 (D.N.H. 1994), Petition at 24a-44a.

The Petitioners appealed to the United States Court of Appeals for the First Circuit. The court of appeals affirmed the district court. *New Hampshire Motor Transport Ass'n v. Town of Plaistow,* 67 F.3rd 326 (1st Cir. 1995), Petition at 6a-23a. The court of appeals held that under the STAA, states may place restrictions upon access to a terminal as long as reasonable access is maintained. The court specifically found that where the restrictions retained reasonable access to terminals, safety need not be the only basis for the restrictions. Since the court of appeals concluded that the district court had correctly construed the STAA, it did not disturb the district court's factual finding that the Town had not denied reasonable access to the terminal. *Id.* at 11a-17a.

The court of appeals also found that the HMTUSA did not preempt enforcement of the ordinance. The restrictions did not impose unnecessary delay on the transportation of hazardous materials. *Id.* at 17a-19a.

Turning to the claims under the NCA, the court of appeals further found that enforcement of the ordinance was not preempted because the restrictions did not regulate decibel levels, exhaust systems or tires of individual trucks. Rather, noise levels were merely one element of an equation including "odors, dust, smoke, refuse matter, fumes . . . and vibrations." *Id.* at 19a-21a.

Finally, the court found that the enforcement of the ordinance did not violate the commerce clause. It found that pursuant to a dormant commerce clause analysis, the burden on interstate commerce was not clearly excessive in relation to the local benefits. *Id.* at 21a-23a.

The Petitioners filed a Petition for Rehearing and Rehearing en Banc. On October 25, 1995, the court of appeals issued a strongly-worded decision denying the Petition. *New Hampshire Motor Transport Ass'n v. Town of Plaistow*, 67 F.3d 326 (1st Cir. 1995), Petition at 3a-5a.

ARGUMENT

"A review on writ of certiorari is not a matter of right, but of judicial discretion. A Petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10.1. No "special" or "important" reason exists in this case.

This is a highly fact-specific case. The decisions of both lower courts primarily rested on factual determinations that this Town's particular restrictions on late-night truck traffic through a specific residential area preserved "reasonable access" to the trucking terminal, did not create an "unnecessary delay" in the transportation of any hazardous materials, and did not create an "undue burden on interstate commerce in relation to putative local benefits".[1]

None of the considerations listed in Supreme Court Rule 10 are present in this case. As to each and every question presented for review, the Petition either fails to allege or erroneously alleges that Rule 10 considerations are present. The Petition also fails to allege the existence of any substantial consideration not mentioned in Rule 10. Most importantly, the Petition does not suggest that any of the issues presented should be reviewed by the Court because they are of general importance to the nation.

Moreover, the court of appeals correctly decided this case. This dispute has been examined by no less than five state and federal courts, all with the same result. Each of those courts, including the court of appeals, properly sustained the Town's right to impose reasonable, limited restrictions on late-night truck traffic in a residential neighborhood in order to protect the health, safety and

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[1]The ruling of the court of appeals regarding the NCA, however, rested solely on an implied preemption analysis. The Petitioners disagree with the outcome of the court's analysis under the NCA. *See* Argument, *infra*, Section III.

welfare of Town residents. For these reasons, as more specifically set forth below, the Petition should be denied.

I. The Surface Transportation Assistance Act

A. The Decision Below Does Not Create A Conflict Among the Circuits.

In spite of an otherwise unsupported statement to the contrary in the Petitioners' Conclusion, the decision below does not create a conflict between circuits with respect to the STAA. Any statement to that effect is simply incorrect. In fact, no other circuit court of appeals has interpreted the express preemption provision of the STAA. For this reason, certiorari should be denied.

The Court may find it important that the Third Circuit has never addressed the preemption provision of the STAA, even though *Consolidated Freightways Corp. v. Larson*, 647 F. Supp. 1479 (M.D. Pa. 1986), *rev'd*, 827 F.2d 916 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988), has a subsequent appellate history. The circuit court's review was limited to issues regarding a late-filed appeal. *See* Brief for Plaintiffs-Appellants at 15, n.9. Similarly, another case cited by the Petitioners, *New York State Motor Truck Assoc., Inc. v. City of New York*, 654 F. Supp. 1521 (S.D.N.Y. 1987), *aff'd*, 933 F.2d 430 (2d Cir. 1987), has an appellate history. The circuit court's review in that case was also unrelated to the STAA. Accordingly, in both cases, the district court was the highest tribunal to interpret the STAA.

B. The Decision Below Does Not Conflict With Decisions of Other District Courts.

The Petitioners' primary argument is that the interpretation of the STAA's express preemption provision conflicts with decisions of district courts in other circuits on the same issue. To the contrary, a careful reading of the cases cited in the Petition shows that a direct conflict does not exist.

In determining that the STAA does not preempt the Town from limiting late-night truck traffic through a residential neighborhood, the court of appeals engaged in a straightforward statutory construction analysis. The express preemption provision of the STAA has two parts. The first part, § 31114(a), prohibits states from denying commercial motor vehicles "reasonable access" between the national network of highways and terminals. The second part, § 31114(b), is an exception to the first provision. The exception discusses restricted access to pup-trailers based on safety considerations.

The court of appeals found that, both as a matter of statutory construction and of common sense, as long as a local regulation maintained "reasonable access" between the national network and a terminal, section (b) of the preemption provision would not apply. In deciding that access could be restricted for reasons other than safety, the court of appeals stated that, "'[r]easonable' [in section (a)] is a comprehensive term. . . and nothing in the language or common-sense makes reasonableness turn solely on safety considerations. Context reenforces this view." In addition, the court found nothing in the statute or in the legislative history evidencing a clear intent of Congress to preclude

access restrictions based on considerations other than safety. "Safety is obviously a paramount reason for limiting access; but, in our view, it is not the only reason permitted by Congress." Accordingly, the court held that as long as a local regulation preserves "reasonable access" to a terminal, the regulation need not be based on safety concerns, and the STAA would not preempt the regulation.

Each case cited in the Petition can be read consistently with the decision of the court of appeals. For example, Petitioners have misinterpreted the holding of *Larson*, 647 F. Supp. 1479. Although the *Larson* court invalidated Pennsylvania's blanket restrictions on access to certain terminals, it did so consistently with the analysis of the court of appeals in this case. The *Larson* court found that Pennsylvania restrictions: (1) were not reasonable; and (2) were not based on safety. Accordingly, *Larson* involved a situation which is not present in this case, i.e. one in which "reasonable access" under section (a) had been denied. *Larson* is not inconsistent with the analysis in this case precisely because the *Larson* court did not hold that safety could be the only basis for restricting access. This finding can be read consistently with the court of appeals' holding that the preemption analysis turns to section (b) and the question of "safety considerations" only where the denial of access is not reasonable. The mere fact that *Larson* did not explicitly state that section (b) must be read separately from section (a) does not render it inconsistent with the analysis of the present case.

Petitioners have also misinterpreted the holding of *New York State Motor Truck Ass'n*, 654 F. Supp. 1521. The facts at issue in that case were similar to those in *Larson*. The restrictions at issue also did not preserve

"reasonable access" under section (a). Accordingly, since reasonable access had been denied, the district court went on to find that, under part (b), permissible restrictions could be based only on safety considerations. This holding is not inconsistent with the decision in the present case. Since the Town allows reasonable access to the terminal, the court of appeals did not need to engage in an analysis under section (b).

The Petitioners have also misinterpreted the holding of *ABF Freight System, Inc. v. Suthard,* 681 F. Supp. 334 (E.D. Va. 1988). In that case, yet another district court examined the preemption provisions of the STAA. *Suthard* is similar to both *Larson* and *N.Y. Motor Truck Ass'n* in that the state regulation at issue did not provide reasonable access to terminals. Therefore, the *Suthard* court engaged in an analysis under section (b) and determined that the denial of reasonable access could be based only on safety considerations. Ultimately, the *Suthard* court found that the denial of reasonable access had not been based on safety considerations as required by section (b), and that therefore, the state regulation was preempted.

Accordingly, none of the cases cited by the Petitioners creates a conflict with the decision below. In each of those cases, the local restrictions operated to deny reasonable access to terminals. The discussion in those cases focused on the second part of the preemption analysis, which is not operative in this case because reasonable access has been preserved. Accordingly, the decisions cited by the Petitioner can be read consistently with the decision below. No conflict exists between the court of appeals and the opinions of other district courts. For this additional reason, certiorari should be denied.

C. Even If The Decision Below Conflicts With Decisions of District Courts, Review By This Court Is Not Warranted.

Even assuming that the Petitioners are correct in their assertion that the decision below conflicts with prior decisions, certiorari review is not warranted:

> The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit. The Court tries to achieve uniformity in federal matters only among the various courts whose decisions are otherwise final in the absence of a Supreme Court review -- the courts of appeals, other federal courts of the same stature, and the highest state courts in which a decision may be had. It is the duty of the courts of appeals to maintain uniformity within their respective circuits and to supervise the decisions of various district courts.

Robert L. Stern, et al., Supreme Court Practice 178-79 (7th ed. 1993).

This general principle applies in the present case. It may be that other circuit courts, given the opportunity, would interpret the STAA preemption provisions in accordance with the first circuit's thorough and well-reasoned interpretation. Until other circuit courts tackle

this issue, it is impossible to discern what shape the general body of law regarding the STAA will take. Accordingly, even if a conflict exists between the court of appeals and a district court, the Petitioners' request for certiorari review is premature. In the absence of any interpretation of the STAA from a court of the same stature as the court of appeals, review by this Court is unnecessary.

Moreover, even in situations in which this Court has noted that a decision of an appellate court conflicted with a decision of a district court, the Court has done so "without suggesting that such a conflict alone would justify the granting of certiorari." *Id.* at 179 (citing *United States v. Constantine*, 296 U.S. 287, 290 (1935). "At most, this type of conflict has been recognized as a factor tending to reinforce some other and more substantial basis for review, such as the importance of the question involved and the confusing and differing judicial responses to that question." *Id.*

In the present case, no "other and more substantial basis for review" has been alleged, nor does any such basis exist. The Petitioners have not argued that there is a question of national importance involved in the outcome of this case. Moreover, due to its fact-intensive nature, this case does not hold national import. In addition, aside from this case, no circuits and only a very few district courts have discussed "reasonable access" under the STAA. The sheer paucity of case law shows that this is not an issue of national importance. Since very few cases have interpreted the STAA, neither can the Petitioners claim there are a number of "confusing and differing judicial responses" to the STAA's preemption provision. For these additional

reasons, this is not an appropriate case for review on a writ of certiorari.

D. The Court of Appeals Correctly Determined that the STAA Does Not Preempt the Town From Imposing Reasonable Late-Night Restrictions on Truck Traffic Through A Residential Area.

The court of appeals determined that it had "no occasion to review the [district] court's further, fact-specific decision that the Plaistow restrictions in this case did permit reasonable access." The Petitioners had "scarcely bothered to argue the point; in a couple of sentences, they simply assert[ed] that the district court findings show that a truck terminal must operate 24 hours a day. The [district court] opinion does not make such a finding and we think appellants' cursory argument waives the factual issue in this case." Since the Petitioners waived any argument they may have had regarding the factual determination that "reasonable access" was being provided by the Town, they are not entitled to further review of the issue. Accordingly, the argument that the court of appeals erred in not reviewing the district court's factual finding that reasonable access had been provided is without merit.

In any event, the court of appeals correctly decided not to review the district court's factual determination that reasonable access to the terminal had been preserved. As set forth in the Statement of Facts, *supra*, the Town presented ample evidence at trial to show that its enforcement of the zoning ordinance was reasonable. For example, the Town restricts traffic only during 9 out of 24 hours. In addition, the district court found that the

restrictions are knowable to truckers in advance of their arrival at the terminal. Even during night-time hours, the Town's restrictions do not shut down the terminal and in no way prevent trucks already at the terminal from loading, unloading, and otherwise conducting their business.

In support of its argument that the court of appeals was correct, the Respondent takes this opportunity to fulfill its obligation to address several perceived misstatements in the Petition regarding this issue. The Petition incorrectly states, "it is also clear from the record that Plaistow's restrictions are in no way based upon safety but relate solely to disturbance suffered by Plaistow residents who live near the terminal's egress. . . ." Petition at 18. This is a mischaracterization of the record. No court has ever ruled that the restrictions were not related to safety. Moreover, the Town presented evidence at trial that enforcement of the zoning ordinance was related to safety, in addition to other considerations. Appendix filed with court of appeals at A102-103, 106; Transcript volume filed with court of appeals at 147-48, 304-307, 339, 357, 360, 403-404. In addition, the zoning ordinance expressly includes "safety" of the community as a concern.

The Petition also states, "Section 1.4 of the Plaistow zoning ordinance as enforced. . .prevents interstate trucks from entering or exiting a terminal located in the adjacent municipality of Newton." Petition at 18. This statement is misleading to the extent that it implies that all traffic to and from the terminal is prohibited. To the contrary, the ordinance, as enforced, only reasonably restricts late-night truck traffic on one residential street located in Plaistow.

Finally, the Petition states that the Town "declined to assert jurisdiction over the construction of the terminal because it was located wholly within the Town of Newton with access through a private drive in Plaistow." Petition at 18. As mentioned in the Statement of Facts, *supra*, although the Town did not assert jurisdiction over the construction of the terminal, this was not because the Town "declined" to do so. The Town could not assert jurisdiction over a construction site in an adjacent town. Even if it had wanted to do so, the Town lacked that authority. To the extent that the statement implies that the Town waived its ability to regulate truck traffic through residential areas within its borders, the statement is groundless.

More importantly, however, to the extent that the same statement and similar statements throughout the Petition imply that the Petitioners were somehow "blindsided" by the Town because the Town waited until the terminal was operational to enforce the zoning ordinance, the statements are disingenuous. The record below provides ample evidence that Town residents were concerned and proactive with respect to the construction of the terminal from the outset. The record below also shows that Petitioners made inaccurate representations regarding operations at the terminal. If anyone was surprised when the terminal began 24 hour operations, it was the residents. Accordingly, to the extent that the Petition suggests that the Petitioners were unfairly treated by the Town, this is inaccurate. For all these reasons, certiorari should be denied.

II. The Hazardous Materials Transportation Uniform Safety Act

A. The Decision Below Does Not Raise Any Issues Which Warrant Review.

With respect to the HMTUSA, the Petition fails to argue that any of the considerations listed in Supreme Court Rule 10 exist in the present case. The Petitioners have not argued, because they cannot argue, that any of those "special" and "important" considerations are at work. For example, the decision of the court of appeals does not conflict with decisions of any other court. Rather, it is entirely consistent with previous decisions of the first circuit, *New Hampshire Transport Ass'n. v. Flynn*, 751 F.2d 43 (1st Cir. 1984), with decisions of other circuits, *Nat'l Tank Truck Carriers v. City of New York*, 577 F.2d 270 (2d Cir. 1982), with decisions of district courts within the first circuit, *Nat'l Tank Truck Carriers v. Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1983) (applying same legal analysis, but reaching different result based factual distinctions), and with decisions of district courts in other circuits, *Missouri Pacific R.R. v. R.R. Comm'n of Texas*, 671 F. Supp. 466, 480 (W.D. Tex. 1987)(applying same legal analysis, but reaching different result based on factual distinctions), *aff'd on other grounds*, 488 U.S. 1009 (1989). Moreover, the Petitioners do not attempt to articulate an argument that this case presents an important issue under the HMTUSA which ought to be decided by this Court. This case does not present such an issue.

The only basis asserted by the Petitioners in support of their request for review seems to be that they did not

agree with the decision below. Although the Petition states that the decision below "conflicts with federal case law and statutory and regulatory provisions regarding the Act," the only case the Petitioners cite in support of this argument is another case from within the first circuit, *Burke*, 535 F. Supp. 509. Even assuming that *Burke* conflicts with the present case, it is the obligation of the circuit to supervise its various districts and to maintain uniformity within itself. *Stern*, *supra*, at 178-79. Accordingly, with respect to the HMTUSA, the Petition should be denied.

B. The Court of Appeals Correctly Determined that the HMTUSA Does Not Preempt the Town's Restrictions.

As the court of appeals noted, the HMTUSA establishes uniform national rules for transportation of hazardous materials. These rules touch upon subjects such as packaging, labeling and handling of hazardous materials. The statute contains an express preemption clause. Corresponding regulations mandate that hazardous materials must be transported without "unnecessary delay". 49 C.F.R. § 177.853(a). The court of appeals also noted that the words "unnecessary delay" indicate that some delays are necessary and acceptable. The Petitioners had the burden to show that the Town's restrictions created "unnecessary delay". They made "little effort to show that on the present record the specific curfew requirements imposed by Plaistow create any risk to the drivers of the trucks, other highway traffic, Plaistow or any other community. . . . At least on this appeal, [Petitioners] have not even attempted a serious fact-specific showing." The Petitioners waived any factual argument that the Town's restrictions created "unnecessary delay." Since they failed to raise this issue

adequately before the court of appeals, they are not entitled to further review.

Moreover, the court of appeals correctly affirmed the decision of the district court. In ruling that the restrictions did not cause "unnecessary delay," the court of appeals considered the following facts: the restrictions only affect one terminal; the restrictions are tailored to specific local conditions; and the restrictions do not impose time limitations on the delivery of hazardous materials in New Hampshire, so long as this terminal is not used as a point of interchange. For this additional reason, the HMTUSA does not preempt the Town's restrictions. Accordingly, certiorari is not warranted on this issue.

III. The Noise Control Act

A. The Decision Below Does Not Raise Any Issues Which Warrant Review.

With regard to the NCA, the Petitioners have failed to specifically articulate any reason, listed in Rule 10 or elsewhere, as to why this Court should review this case. The Petition does not discuss any "special" or "important" reason in support of its request. The Petition does not allege a conflict with any other court. Indeed, only a very small number of cases have addressed the NCA. None of those decisions conflict with the legal analysis of the court of appeals. *See, e.g., Baltimore and Ohio R.R. Co. v. Oberly,* 837 F.2d 108 (3d Cir. 1988).

B. The Court of Appeals Correctly Determined that the NCA Does Not Preempt the Town's Restrictions.

Moreover, the court of appeals correctly upheld the district court's 12(b)(6) dismissal of the preemption claim under the NCA. As the decision below notes, the NCA does nothing more than set minimum and maximum decibel levels for trucking equipment that may operate on public roadways. 40 C.F.R. §§ 202.20. The statute's express preemption provision merely prevents localities from setting different decibel levels for motor carriers within its jurisdiction. 42 U.S.C. § 4917 (c)(1). By enacting the NCA, Congress did not intend to preempt every local attempt to regulate noise. By its own terms, the NCA's preemptive effect is extremely limited: "primary responsibility for control of noise rests with State and local governments. . . ." 42 U.S.C. § 4901(a)(3). As the court of appeals aptly stated, "it would stretch the words [of the preemption provision] beyond their ordinary meaning to strike down a local curfew order based on a range of concerns where federal law regulates only the decibel levels of the equipment." The NCA does not preempt the Town's regulation of night-time truck traffic in a residential neighborhood, where such regulation does not attempt to impose maximum decibel levels on such traffic.

In addition, the court of appeals' preemption analysis is supported by the third circuit's analysis of the NCA in *Baltimore and Ohio R.R. Co. v. Oberly*, 837 F.2d 108. That case discussed the preemptive effect of analogous NCA regulations on interstate rail carriers. *Oberly* stated:

> Section 17(c)(1) simply is not a global preemption provision. To the contrary, it provides only that each federal noise regulation, once enacted, bars direct states regulations of noise emissions. . . . [I]t in no way suggests that Congress meant for the adoption of any federal noise regulation to bar or displace every state effort to regulate the noise emissions.

Id. at 114 (emphasis in original). As in *Oberly*, the court of appeals in this case properly decided that the Petitioners' claim under the NCA could not succeed. Accordingly, the Petition should be denied.

V. The Commerce Clause

A. The Decision Below Does Not Raise Any Issues Which Warrant Review.

With respect to the commerce clause, the Petitioners have failed to specifically articulate any reason why this Court should review the decision below. The Petitioners have not argued that a single Rule 10 consideration is present in this case. Nor have the Petitioners alleged any other recognized basis for review by this Court. In essence, the Petitioners merely complain that the court of appeals decided a factual issue in a manner adverse to their interests.

B. The Court of Appeals Correctly Determined that the Commerce Clause Does Not Preempt the Town's Restrictions.

In any event, the court of appeals applied the correct commerce clause analysis in a manner consistent with the previous decisions of this Court. This case involves an incidental burden on interstate commerce. *Maine v. Taylor, 477 U.S. 131 (1986).* The court of appeals properly applied a "dormant" commerce clause analysis. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). According to prior decisions of this Court, the dormant commerce clause analysis requires a determination of whether the burden imposed on commerce is clearly excessive in relation to the local putative benefits. *Id.* at 142. The court of appeals properly insisted on a "fairly clear showing of undue burden before holding unconstitutional a traditional example of local regulation." *Raymond Motor Transport. Inc. v. Rice*, 434 U.S. 429 (1978).

The Petitioners failed to make such a showing in this case. The court of appeals examined at length the facts relevant to this analysis. It determined that in this case, the "burden of the curfew on interstate commerce has not been shown to be excessive in relation to the benefits." The crux of the Petitioners' argument is that the court of appeals erroneously decided this factual issue. This argument, however, is insufficient to warrant review. Generally, this Court does not grant certiorari to review the factual determinations of lower courts, particularly where the findings of fact made by the district court receive the concurrence of the court of appeals, as is the situation in

the present case. *Stern, supra,* at 189. For this additional reason, certiorari should not be granted in this case.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that this Court deny the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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February 26, 1996